# Corrs Projects Update

Q3 2021 edition

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# Welcome to the latest edition of Corrs Projects Update Q3 2021

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.

As well as case notes on the recent important judicial decisions from across Australia, this edition also includes articles covering:

- the reinstatement of electronic execution of documents under the Corporations Act;
- the impact of supply chain shortages on the Australian construction industry;
- Australia's readiness for the increased proliferation of electronic vehicles;
- climate change litigation trends and developments, and what corporations can do to protect themselves; and
- reform of the electricity supply industry in Papua New Guinea.

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

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## Insights

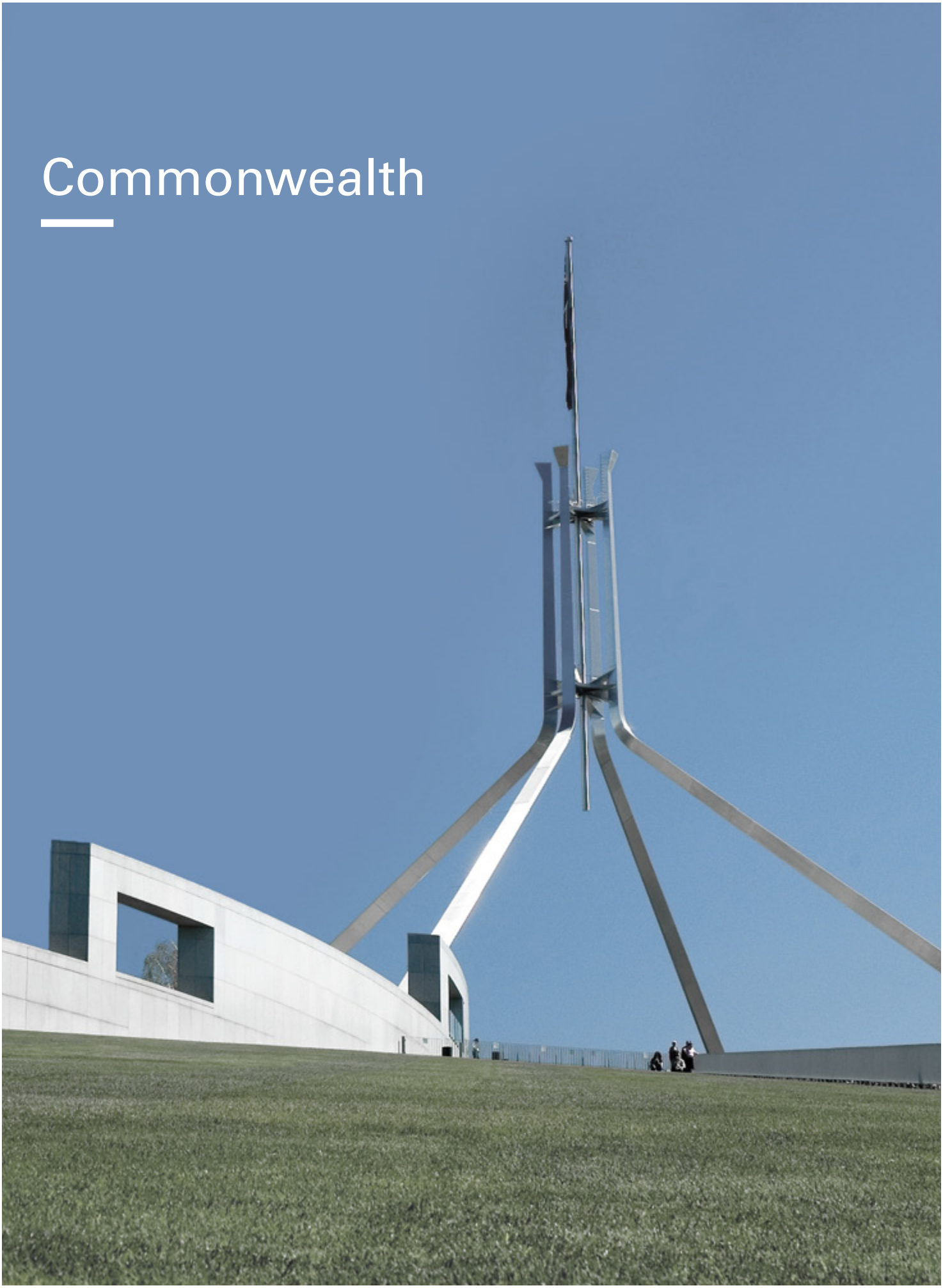
Corrs regularly publishes insight articles which consider issues affecting various sectors of the domestic and global economies. We have included at the end of this Update links to some of our recent articles on issues affecting the construction industry.

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

# Contents



# Commonwealth



# Price v Spoor

## [2021] HCA 20

### Key takeaways

Contracting parties may agree to give up a defence under the *Limitation of Actions Act 1974* (Qld). Section 24 does not operate to extinguish rights automatically at the end of the limitation period.

In general, courts will enforce a contractual promise not to plead a statutory limitation period. Of course, this will turn on the particular contractual and statutory language.

### Keywords

Limitation of actions

## Background

In 1988, a mortgagee (**Spoor**) and mortgagor (**Price**) entered into mortgages for $320,000 to be paid by 2 July 2000. The loan was not repaid by that date. The mortgages contained a term that the mortgagor would not plead any statutory limitation period defence.

The loan was secured by mortgages over three plots of Price's land. The respondents, successors in title to Spoor, sued Price for repayment and sought to recover possession of the three plots of land.

Price argued that Spoor was statute-barred from enforcing rights under the mortgages because the relevant time period under the *Limitation of Actions Act 1974* (Qld) (**Limitation Act**) had expired and the titles under the mortgages had been extinguished under section 24(1). Spoor relied on clause 24 of each mortgage as a covenant by Price not to plead a defence of limitation.

## Issues

The High Court considered two key questions:

### Issue 1 — is an agreement not to plead the statutory limitation contrary to public policy and, if so, unenforceable?

The High Court unanimously answered 'no' to this question, but did so in three judgments: Kiefel CJ and Edelman J; Gageler and Gordon JJ; and Steward J.

#### The Limitation Act

The High Court had previously considered similar issues in *Commonwealth v Mewett*.[1] In Mewett, Gummow and Kirby JJ held that, in the case of a statute of limitation in traditional form, a statutory bar does not go to the court's jurisdiction to entertain the claim, but rather to the remedy available and therefore to the defences that may be pleaded.[2]

1 *Commonwealth v Mewett* (1997) 191 CLR 471 (Mewett).

2 This was reaffirmed by the High Court in *WorkCover Queensland v Amaca Pty Ltd* (2010) 241 CLR 420.

These reasons corresponded to Mason CJ's judgment in *Commonwealth v Verwayen*,[3] which addressed section 5(6) of the *Limitation of Actions Act 1958* (Vic). His Honour held that although that section was capable of being read as going to the jurisdiction of the court, limitation provisions of that kind had not been held to have that effect. Instead, limitation provisions have been held to bar the remedy but not the right. They thus create a defence to the action, which must be pleaded.

### Public Policy

The High Court also considered *Westfield Management Ltd v AMP Capital Property Nominees*, in which it was accepted that a person on whom a statute confers a right may waive that right, unless it would be contrary to the statute to do so. This is particularly so if the statute expressly prohibits contracting out of rights or where the statute is inconsistent with a person's power to forgo statutory rights.

Their Honours agreed with Mason CJ in *Verwayen*, who held that by giving defendants a right to plead a defence, rather than imposing a jurisdictional restriction, the purpose of the Victorian Limitation Act was to confer a benefit on individuals 'rather than to meet some public need which must be satisfied to the exclusion of the right of access of individuals to the courts'.[4] All of this suggested that it is possible to contract out of statutory provisions of that kind.

In summary, in *Price*, their Honours confirmed that the Limitation Act conferred a right on an individual and that public policy does not prevent a person from waiving that right. This can be inferred from the language of the statute, further taking into account that the legislation does not, by its proper construction, seek to remove the court's jurisdiction once a limitation period has ended, but rather confers a benefit or right on an individual basis. As such, no issue of public policy arises where a person chooses to contract out of the limitation period.

### Issue 2 — does section 24 of the Limitation Act operate automatically?

Their Honours again provided a unanimous answer to this question: 'no'.

Section 24 of the Limitation Act provides that where the time to bring an action to recover land has expired (12 years), the person's title to that land shall be extinguished. Price argued that section 24 operated to extinguish rights rather than create them, and should automatically be applied at the end of the limitation period regardless of whether the limitation period was pleaded in defence.

The High Court did not accept this argument. Their Honours held that if section 24 was intended to operate automatically to extinguish rights, without the need to plead the defence, there would remain no right or title in respect of which a court could provide any remedy.

Section 24 still requires that the defence of limitation be raised by pleading to take effect. As Kiefel CJ and Edelman J put it, the 'defeating' or 'extinguishing' of rights occurs when the parties agree that the statue 'shall not apply hereto' and shall be regarded as 'expressly excluded'.

## Conclusion

The High Court unanimously dismissed the appeal, finding in favour of Spoor. Parties can agree to not have the benefit of the Limitation Act and doing so is not contrary to public policy. Subject to the precise wording, the same conclusion should typically apply to most limitations legislation.

The High Court further held that section 24 of the Limitation Act did not operate automatically to extinguish title at the expiry of the limitation period.

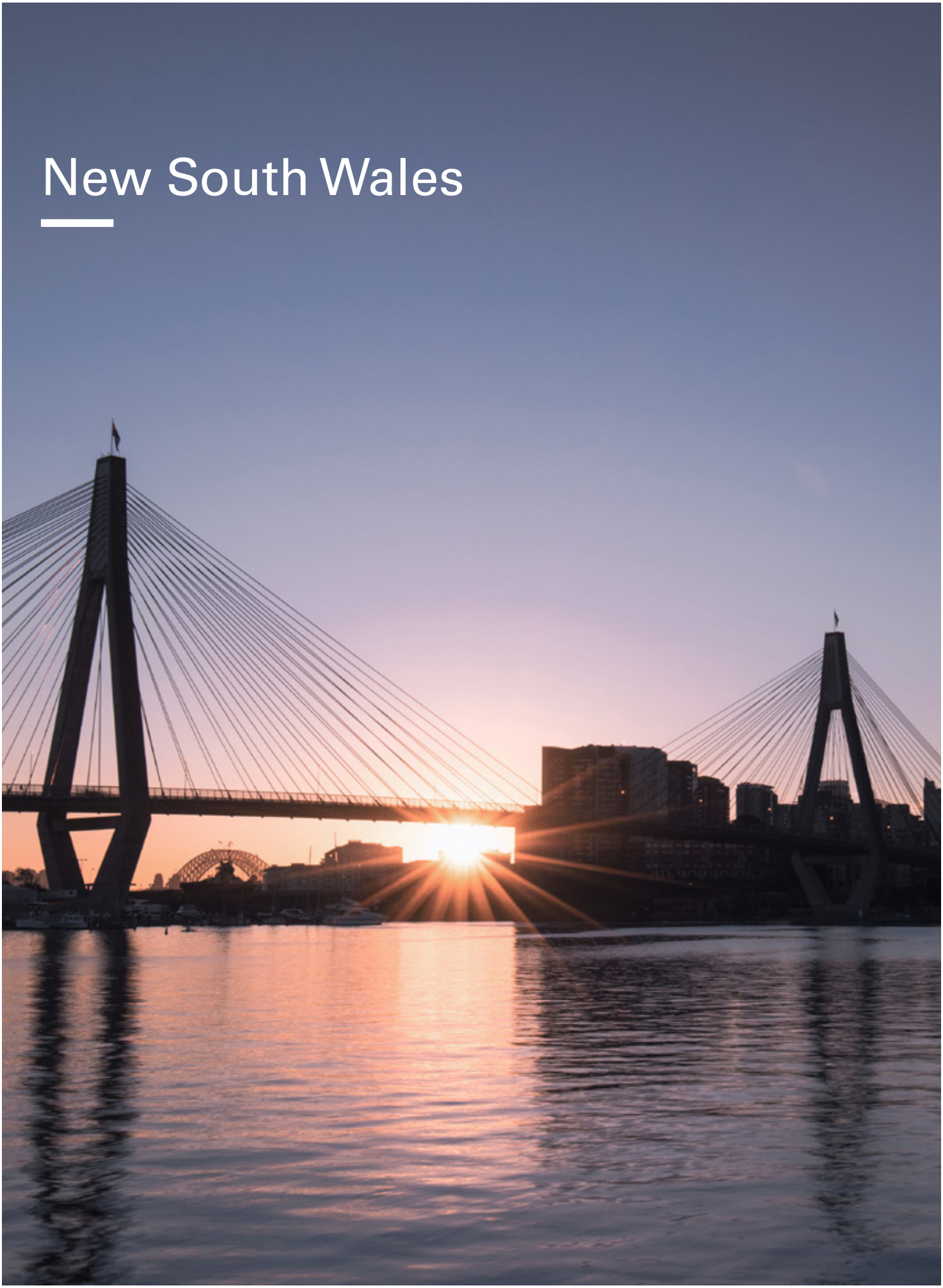
As Kiefel CJ and Edelman J pithily concluded: 'A defendant may bargain away the statutory right and that bargain may be enforced.'

https://eresources.hcourt.gov.au/downloadPdf/2021/HCA/20

3 *Commonwealth v Verwayen* (1990) 170 CLR 394 at 405 (**Verwayen**).

4 *Verwayen* at 405–406.

# New South Wales



# Valmont Interiors Pty Ltd v Giorgio Armani Australia Pty Ltd (No 2)

## [2021] NSWCA 93

### Key takeaways

Clear communication between parties is imperative, especially when dealing with notice requirements and time bars. Careless correspondence may sustain arguments of waiver or estoppel.

### Keywords

Variations

Notice requirements

## Background

In 2016, Giorgio Armani Australia Pty Ltd (**Armani**) engaged Valmont Interiors Pty Ltd (**Valmont**), to provide construction and fit-out works for a new Armani store at Sydney Kingsford Smith Airport.

The contract sum was described as a 'fixed project price inclusive of all items, except those supplied by the client'. Included in these 'client supply items' was joinery, which Armani had organised to be supplied by a third-party firm. However, the third party later advised Armani that it could not supply the joinery on time. Accordingly, Armani requested that Valmont supply the joinery instead. In an email exchange, the parties discussed the nature of the joinery works and Valmont's corresponding entitlement to remuneration.

Valmont supplied the joinery and assumed that it would be compensated for doing so. However, Armani refused to pay Valmont, maintaining that clause 15.2 of the contract (the **Variations Clause**) operated as a release by Valmont of any claim in relation to the joinery:

> 'If [Valmont] considers that a Direction of [Armani] is a Variation but [Armani] has not issued a Variation Direction, [Valmont] must give notice of the purported Variation to [Armani] within five Business Days after the Direction by [Armani] that constitutes the purported Variation and clause 15.1 will apply to the purported Variation. If notice is not provided by [Valmont] in accordance with this clause 15.2, [Valmont] releases and waives any entitlement it may have to a Claim against [Armani] in connection with, or arising from, the purported Variation'.

## Issues

The case was initially heard in the District Court of New South Wales. Valmont appealed to the New South Wales Court of Appeal. The Court considered two issues:

- whether the joinery works was a variation within the meaning of clause 15; and
- whether Armani was estopped from relying on clause 15.2 in respect of the joinery works.

## Decision

The Court (Bell P; Macfarlan and Leeming JJA agreeing) upheld Valmont's appeal.

The first issue largely turned on the facts. The Court held that the critical email from Armani was insufficiently clear to convey that it did not intend to pay Valmont for the balance of the joinery. The email only referred to a façade and not the joinery, and did not displace the assumption that Armani would compensate Valmont for the cost of supplying the balance of the joinery. The fact that the email stated that there were 'no variations on this project' implicitly conveyed that the joinery works were separate and outside the scope of the contract.

Additionally, emails from Armani indicating that it was 'happy to agree upon additional payment' further demonstrated its understanding that the joinery works were not variations of originally agreed-upon works.

Having failed to fulfil its contractual obligation to supply the joinery through the third party, Armani could not argue that it was not required to pay Valmont for failing to comply with clause 15.2. Given the correspondence between the parties, Armani was estopped from relying on clause 15.2 as it would be unconscionable for Armani to resist paying for the joinery.

https://www.caselaw.nsw.gov.au/decision/1797cda40e5fa2ee913e49da

# The Owners - Strata Plan No 87265 v Saaib; The Owners - Strata Plan No 87265 v Alexandrova

[2021] NSWSC 150

## Key takeaways

To prove a principal and agent relationship, there must be a reasonable and definite inference of the consent of the principal and agent, and the authority conferred on the agent. This inference must come from evidence which makes it reasonably probable that the agency relationship exists. Showing the possibility of that fact is not enough.

Insurance brokers may be liable for misleading or deceptive conduct where they lead insurers into a false belief.

## Keywords

Identifying the builder

Misleading or deceptive conduct

## Facts

The Owners Corporation of 11 townhouses in Marrickville, New South Wales brought separate proceedings against a builder and an insurance broker.

Saaib was a builder and his name appeared on a contract for residential work on the Marrickville property. The Owners Corporation alleged that the work had been done in breach of the warranties implied by the *Home Building Act 1989* (NSW) and sought damages of over $3.5 million. The Owners Corporation argued that Saaib had authorised his nephew, Zaatini, to enter into the contract on his behalf and to deal with his insurance broker to arrange home warranty insurance to cover the construction works. In fact, Zaatini had signed Saaib's signature on both the contract and insurance documents.

The second proceedings were against Alexandrova, an insurance broker who lodged documents to obtain home warranty insurance for the Marrickville property. The Owners Corporation alleged that Alexandrova engaged in misleading or deceptive conduct in breach of section 18 of the Australian Consumer Law or section 42 of the *Fair Trading Act 1987* (NSW).

It alleged that Alexandrova had represented that she was authorised by Saaib to submit the documents to obtain home warranty insurance when in fact she was not authorised, and the documents did not contain the true signature of Saaib.

The two proceedings were heard together in the NSW Supreme Court before Henry J.

## Decision

Henry J dismissed the first proceedings against Saaib, finding that he had not authorised Zaatini to enter into the contract on his behalf.

In the second proceeding, Henry J held in favour of the Owners Corporation against Alexandrova, finding that she had engaged in misleading or deceptive conduct in representing to OAMPS Insurance Brokers Limited that she had authority to apply for home builders insurance on Saaib's behalf.

### Judgment on issues

**Did Saaib authorise Zaatini to enter into the contract on his behalf?**

While it was accepted that Saaib did not sign the contract, the Owners Corporation argued that Saaib authorised Zaatini to enter into the contract on his behalf.

There was conflicting evidence as to whether Saaib indicated his authority for Zaatini to act on his behalf in relation to the Marrickville property, and whether Saaib gave directions for Alexandrova to assist with and put his name on documents for home warranty insurance for the Marrickville property.

Alexandrova recounted multiple telephone conversations in which the pair discussed the Marrickville property contract and insurance application. Alexandrova alleged Saaib had acknowledged the Marrickville property, discussed giving authority for Zaatini to assist him and agreed to have the insurance application in Saaib's name. Saaib denied these conversations occurred and denied any knowledge of the Marrickville property.

Both parties submitted multiple contemporaneous materials, including a letter to Saaib dated 15 October 2014 from Trinity Realty notifying him that the property had serious defects for which the Owners Corporation held Saaib responsible. There was also a follow up letter from Trinity Realty on 24 October 2014 to Zaatini, who responded saying 'this matter is not the issue of Mr Tony Saaib, as Mr Tony Saaib was never the builder on the site'.

While ultimately deciding that neither witness was particularly reliable, Henry J found that 'the objective facts, contemporaneous materials and logic of events [did] not support the inference that Mr Saaib consented to Mr Zaatini acting as his agent and knew and approved of him entering into' the contract.

### Did Saaib authorise Alexandrova to lodge the contract and insurance documents?

Henry J was also not satisfied, based on evidence from phone calls, emails and cross-examination, that Alexandrova was authorised to lodge the contract and insurance documents.

### Did Alexandrova represent that she was authorised to apply for home builders insurance?

A person who merely acts as a conduit and does nothing more than pass on information will not be found to have engaged in conduct that is misleading or deceptive.[1] Henry J found that Alexandrova had impliedly represented that she was authorised to submit the documents.

### Was that representation misleading or deceptive?

Conduct will be misleading or deceptive if it has a tendency to lead a person into error.[2] Henry J found that Alexandrova's conduct was misleading or deceptive on the basis of the previous findings that Saaib had not authorised Zaatini to enter into the contract and had not authorised Alexandrova to obtain home warranty insurance.

As a result, Henry J found that Alexandrova's representations in submitting the insurance documentation were likely to lead the insurer into erroneously thinking the contract naming Saaib as builder was made with his authority and that he had signed the insurance documents, neither of which was true.

https://www.caselaw.nsw.gov.au/decision/177db6a215be8a9b279f0a7f

1 *Yorke v Lucas* (1985) 158 CLR 661 at 666.

2 *Australian Competition and Consumer Commission v TPG Internet Pty Ltd* (2013) 250 CLR 640.

# Growthbuilt Pty Ltd v Modern Touch Marble & Granite Pty Ltd

## [2021] NSWSC 290

### Key takeaways

The prevention principle has been said to be grounded in the implied duty to act reasonably or in good faith, or in the duty to cooperate. However, parties may contract out of duties of this kind.

Where a principal's power is exercisable in its 'absolute discretion', there can be no implication of reasonableness or good faith duties on that discretionary power, such as a unilateral right to extend the date for completion.

### Keywords

Prevention principle

Liquidated damages

## Facts

Growthbuilt Pty Ltd (**Growthbuilt**) entered into four subcontracts with Modern Touch Marble & Granite Pty Limited (**Modern**) to design, supply and install stone in four residential buildings. Growthbuilt subsequently terminated the subcontracts because Modern failed to complete the Works on time. Growthbuilt sued to recover liquidated damages under each subcontract from the respective dates of completion until the termination date, for a total of $1.3 million.

## Issues

The most relevant aspects of the decision turned on the drafting of the extension of time mechanism in the subcontracts, and extent to which it related to the operation of the prevention principle.

The extension of time clause was bespoke, but included the usual elements which required the claimant (Modern) to issue a prescribed notice claiming an extension of time, failing which it would not be entitled to any such extension. The clause also included a reserve power enabling Growthbuilt to extend time absent any claim by Modern.

Modern relied on the decisions in *Probuild Constructions (Aust) Pty Ltd v DDI Group Pty Ltd* [2017] NSWCA 151 and *620 Collins Street Pty Ltd v Abigroup Contractors Pty Ltd (No 2)* [2006] VSC 491 in support of an argument that Growthbuilt was required to exercise the reserve power honestly and fairly and having regard to the prevention principle, despite the absence of any claim.

Growthbuilt sought to distinguish this matter from those cases, on the basis that the subcontracts gave Growthbuilt an 'absolute discretion' as to whether or not it would exercise of the reserve power.

The Court accepted Growthbuilt's interpretation. The Court said:

> "An obligation of reasonableness and good faith in the exercise of a unilateral contractual power may be implied as a matter of law as an incident of a particular type of commercial contract. However, the implication of such terms cannot extend to imposing obligations on parties that are, in effect, inconsistent with the terms of the relevant agreement itself." (at [72])

## Conclusion

The decision adds to the body of law which considers the operation of the prevention principle where there is an express extension of time mechanism.

Superficially, this case suggests that provided the reserve power is worded using phrases such as 'absolute discretion' then the prevention principle can be effectively excluded from operating to regulate the rights between contracting parties.

In Corrs' view, there remains uncertainty as to whether this type of drafting will always result in the prevention principle being excluded. There remains, in our view, opportunities to argue on particular facts that despite this type of drafting, the prevention principle would still have work to do to regulate the parties' rights.

https://www.caselaw.nsw.gov.au/decision/178679c484d73e02f8186a61

# MGW Engineering Pty Ltd t/a Forefront Services v CMOC Mining Pty Ltd

## [2021] NSWSC 514

### Key takeaways

This case provides practical guidance on the methods of service set out in section 31 of the *Building and Construction Industry Security of Payment Act 1999* (NSW).

Contractors must ensure that payment claims are brought to the attention of the relevant responsible person. Payment claims simply handed to a person on site may not be found to have been served until they come to the attention of the relevant responsible person.

Construction contracts validly deem service of a payment claim to occur the day after its delivery if it is delivered outside business hours.

### Keywords

Service of security of payment documents

Office hours

## Background

MGW Engineering Pty Ltd (trading as Forefront Services) (**Forefront**) and CMOC Mining Services Pty Ltd (**CMOC**) entered into four contracts for Forefront to provide its services to CMOC's project, a mine in central New South Wales.

On 3 February 2021 at 5.15 pm, an employee of Forefront delivered four payment claims to an employee of CMOC, who was then on duty at CMOC's access control room at the mine. The following day, on 4 February 2021, Forefront electronically issued the four payment claims to CMOC via Aconex (a software platform). Forefront brought these proceedings against CMOC in reliance on the four payment claims, arguing that they had been validly served under the *Building and Construction Industry Security of Payment Act 1999* (the **Act**).

## Issues

The principal issue before Stevenson J was to determine the date on which the payment schedules were served on CMOC. Determining the date of service was essential as CMOC had 10 days to serve payment schedules under section 14(4)(b)(ii) of the Act.

CMOC served its payment schedules on 18 February 2021. On CMOC's date of electronic service of the payment claims, being 4 February 2021, the payment schedules would have been served within the required time. On this basis, Forefront would be entitled to roughly $180,000. However, if 3 February 2021 was accepted as the date of service, the payment schedules were served one day late, meaning CMOC would be required to pay the total claimed amount — over $6 million — on the due date for the progress payment to which the claim related.

## Decision

Forefront's claims (summarised below) were rejected in their entirety. The Court found the payment claims were served on 4 February 2021.

### The payment claims were not delivered to CMOC 'personally' on 3 February 2021

Forefront argued the payment schedules were served on CMOC 'personally' on 3 February 2021 under section 31(1)(a) of the Act.

Stevenson J summarised the test for service as requiring the serving party to prove 'to the court's satisfaction that the document actually came to the attention of an officer of the company who was either expressly or implicitly authorised by the company to deal directly and responsively with the document, or documents of that nature'.[1] Each of the respective payment claims was found not to have come to the attention of the relevantly responsible person, to whom the payment claims were addressed, until 4 February 2021, when they next attended the mine.

### The payment claims were not 'lodged' with CMOC during 'normal office hours' at CMOC's 'ordinary place of business' on 3 February 2021

Alternatively, Forefront argued the payment claims were lodged with CMOC during normal office hours at CMOC's ordinary place of business, under section 31(1)(b) of the Act.

His Honour held that for a document to be considered 'lodged', more is required than simply leaving the document with an employee at any location within the corporation's business premises, irrespective of that employee's functions and irrespective of how junior that employee was. His Honour concluded that the payment claims were not served on 3 February 2021 because they did not come to the attention of the relevant responsible persons until 4 February 2021.

The Court was required to determine what constituted 'normal office hours' at the mine, which operates 24 hours a day, seven days a week, every day of the year. His Honour noted that 'office hours' differ from 'operating' hours within the context of section 31(1)(b).

Stevenson J's opinion was that 'office hours' for the purposes of section 31(1)(b) means the hours 'that the administrative or clerical staff of the person would normally keep'. Evidence indicated CMOC employees worked in a range of capacities between various times. There was almost always someone on site in the access control room or the administrative building.

However, the employees whose roles could be characterised as 'administrative' or 'clerical' worked between the hours of 7.00 am or 7.30 am and 4.00 pm or 4.30 pm. As the payment claims were delivered at 5.15 pm, it was concluded the payment claims were not delivered within the 'normal office hours'.

### The payment claims were served in a manner provided for under the contracts

Forefront argued the contracts were duly served through a service method provided for in the contract, which is permitted under section 31(1)(e) of the Act. Clause 47.2 of the Contract stated:

A Notice will be taken to be duly given:

- In the case of delivery by hand, when delivered;

  …… but if the result is that a Notice would be taken to be given or made on a day that is not a Business Day or the notice is sent or is [delivered][2] later than 4.00 pm (local time) it will be taken to have been duly given or made at the commencement of a business on the next Business Day.

Forefront argued the provision that a notice delivered after 4.00 pm would be taken to be delivered the next day was void under section 34 of the Act as it was an attempt to contract out of the Act. His Honour disagreed with Forefront's argument that the clause was void. His Honour found that whilst the contract allowed for service through 'delivery by hand', the next Business Day condition of the clause was not void as it was facultative and operated to give effect to section 31(1)(e) of the Act.

Ultimately his Honour concluded that service was effected on 4 February 2021.

https://www.caselaw.nsw.gov.au/decision/1795a0a5d28d3cefc97e90fc

1 At [24], quoting *Woodgate v Garard Pty Ltd* [2010] NSWSC 508 at [42] and [44] (Palmer J).

2 The word 'delivered' was inserted in the proceedings, in square brackets, as the word was accidentally omitted from the clause within the contract.

# Queensland

# Ausipile Pty Ltd v Bothar Boring & Tunnelling (Australia) Pty Ltd

## [2021] QSC 39

### Key takeaways

Payment claims made under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) will be void if they relate to more than one contract. The party making the claim will then be prevented from later commencing court proceedings to enforce their entitlement to payment.

Even if, on their face, the items in the claim relate to only one contract, courts may investigate further to determine whether any of the items, in particular those said to arise out of variations, are in fact related to a separate contract. Prudent parties ought to draw a clear distinction before submitting payment claims and be sure not to intermingle claims that could possibly arise out of different contracts.

### Keywords

Payment claims

## Background

Bothar Boring & Tunnelling (Australia) Pty Ltd (**Bothar**) engaged Ausipile Pty Ltd (**Ausipile**) as a subcontractor to design and construct a secant pile launch shaft at Biggera Waters. The launch shaft consisted of a number of overlapping secant piles forming a retaining wall used to hold back water and soil so that the shaft could be excavated to enable tunnelling without risk of flooding.

Over the course of the parties' contractual relationship, Ausipile issued several payment claims to Bothar. However, it became apparent during the project that there would be significant defects in the secant piles. Bothar decided to hold back some payments as leverage to ensure that Ausipile returned to fix the work. As is so often in security of payment cases, much turns on the detail of the facts.

On 26 April 2019, representatives of the parties discussed the possible withholding of payments. There were differing recollections about the outcome of the conversation.

Shortly afterwards, on 30 April 2019, Ausipile issued Payment Claim 5. Bothar did not pay.

Bothar's project manager wrote to Ausipile the next day providing a defects notice summarising the issues encountered during the design and construction of the launch shaft. In the letter the project manager noted that the parties had discussed, in the conversation on 26 April 2019, that Payment Claim 5 and any future claims would not be paid pending resolution of defects.

Ausipile's personnel considered the 1 May 2019 letter internally, but did not respond to the project manager's remarks about the 26 April 2019 conversation.

On 24 May 2019, Ausipile issued Payment Claim 6 for $786,296. This sum included unpaid amounts from Payment Claim 4, the wholly unpaid amount of Payment Claim 5 and an additional amount for Bothar's hire of Ausipile's crawler crane to complete works under the head contract.

In response, Bothar paid $25,000, leaving $761,296 outstanding.

Rather than commencing adjudication proceedings, Ausipile commenced proceedings in the Supreme Court of Queensland seeking to recover the $761,296.75 for Payment Claim 6, pursuant to section 78(2)(a) of the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Act**).[1] That section allows a party to recover on an unpaid payment claim in court as a debt once the due date for that progress payment has passed.

## Issues

It was uncontroversial that Bothar had not paid Payment Claim 6 or issued a payment schedule in respect of Payment Claims 5 or 6, as it was required to do under section 76 of the Act. The parties agreed that Ausipile would be entitled to judgment in its favour unless one of Bothar's three defences succeeded, namely that:

- Ausipile had engaged in misleading or deceptive conduct;
- Ausipile had not given a valid 'warning notice' before commencing proceedings; and
- Payment Claim 6 concerned two separate contracts, and was therefore void.

## Decision

### Defence 1 — did Ausipile engage in misleading or deceptive conduct?

The parties both accepted that, if Ausipile had misled or deceived Bothar that would be a satisfactory defence to Ausipile's claim.

The first question was whether Ausipile had by its conduct represented to Bothar that:

- Bothar was not required to deliver a payment schedule in response to Payment Claims 5 or 6;
- Bothar was not required to assess or pay Payment Claims 5 or 6 until the excavation of the shaft was completed; and
- Ausipile would not enforce its rights to Payment Claims 5 or 6 under the Act.

The second question was whether Bothar had relied on this conduct in failing to deliver a payment schedule in respect of Payment Claims 5 and 6.

Bothar argued that, after the conversation on 26 April 2019, it had formed the view that there was an agreement with Ausipile that Bothar could withhold Payment Claims 5 and 6 pending satisfactory completion of the works. It communicated this view to Ausipile in the letter sent on 1 May 2019.

Ausipile had then discussed the letter internally, determined that no such arrangement had been agreed, and so come to the conclusion that Bothar had misunderstood the outcome of the 26 April 2019 conversation. For Ausipile to remain silent and not correct Bothar's misunderstanding was claimed to be misleading or deceptive.

The Supreme Court disagreed, and found that there was no misleading or deceptive conduct, for four reasons.[2]

First, although Bothar argued that it had relied on Ausipile's silence when failing to issue payment schedules for Payment Claims 5 and 6, Bothar had actually never issued a payment schedule at any point in the project. Bothar's project manager was not aware that issuing these schedules was compulsory under the Act. Bothar had not relied on Ausipile's conduct when it failed to issue the schedules for Payment Claims 5 and 6.

Secondly, the conversation on 26 April 2019 was between Bothar's project manager and Ausipile's operations manager; the operations manager having nothing to do with Ausipile's accounts or payment claims. Even if the operations manager had seemingly understood the arrangement that Bothar was proposing, this would not indicate that Ausipile had actually agreed to the arrangement.

1 See also the meaning of the term 'payment claim' in section 68 of the Act, and the relevance of section 100 to proceedings to recover unpaid amounts as debt.

2 At [82]–[119].

Thirdly, in the 1 May 2019 letter, Bothar's project manager had used the word 'discussed' rather than 'agreed' when referring to the outcome of the 26 April 2019 meeting, suggesting that Bothar did not regard the conversation as having resulted in consensus as to a new arrangement.

Finally, the internal discussions at Ausipile following receipt of the 1 May 2019 letter did not indicate that Ausipile had at that stage realised any misunderstanding on the part of Bothar. The 1 May 2019 letter did not even suggest a misunderstanding; it merely referred to a discussion that had taken place.

For these reasons, there was no expectation that Ausipile would correct any misunderstanding on the part of Bothar.[3] Ausipile's silence was not misleading or deceptive and the first defence failed.

### Defence 2 — was a valid warning notice given?

Bothar's second defence relied on a cascading series of arguments.

It was contended, first, that the subcontract between the parties had been varied, changing the payment terms therein to allow Bothar a period of more than 25 business days to pay Ausipile's payment claims. However, the variation was void since it was contrary to Queensland legislation prohibiting contractual provisions by which payments can be delayed to such an extent.[4] Since the variation was void, it was as if no payment terms were set out in the subcontract.

Bothar contended that, in the absence of any terms agreed by the parties, the payment terms set out in section 73(1)(b) of the Act applied. Under those terms, Ausipile had been late to issue to Bothar a 'warning notice' of its intention to commence court proceedings, as required by section 99 of the Act. The failure to issue a warning notice in time meant that Ausipile should have been barred from commencing the proceedings.

The Supreme Court found that Bothar failed at the first stage of its argument: there had been no variation.

Bothar had argued that the contract was varied by the parties' conduct. The subcontract specified that the due date for payment of claims was 30 days after the claims were made. However, invoices were issued in a form that specified that payments were due '30 days EOM', that is, 30 days after the end of the month in which the claims were made.

Yet the Court found that the payment claims themselves usually stated a due date different from that on the invoices. Further still, Bothar had not even been in the practice of paying the claims according to any of those deadlines. This conduct did not demonstrate an agreed change to the terms of the subcontract.

In any event, the exchanges between the parties were of too informal a character to prove an intention on behalf of the parties to alter their legal relationship. The second defence therefore failed.

### Defence 3 — were there two contracts in one payment claim?

When Ausipile began to demobilise its on-site equipment in April 2019, at the completion of the principal work under the subcontract, Bothar had hired Ausipile's crawler crane at a rate of $2,150 per day for work remaining under the head contract. Payment Claim 6 contained an item for $21,500 relating to the hire of the crawler crane.

Accordingly, Bothar argued that Payment Claim 6 was made in respect of works under two separate contracts: the subcontract and an informal crawler crane hire agreement. It was contended that a purported payment claim made in respect of two separate contracts was invalid, and so Ausipile had no right to commence the proceedings.

The Supreme Court began by finding that there were indeed two separate contracts. The subcontract had a defined scope of work. It was for the design and construction of a secant pile launch shaft at Biggera Waters. The hire of the crawler crane to Bothar was unrelated to any of the work required under the subcontract, and the crane was ultimately used by Bothar independently for work under the head contract.

The next question was whether a payment claim relating to two separate contracts was invalid under the Act. The parties each referred to a number of case authorities to bolster their positions. Bothar pointed to a line of decisions dictating that a payment claim must relate only to one contract.[5]

Ausipile accepted the effect of these decisions, but pointed to other cases that suggested that so long as the payment claim 'on its face' related to only one contract, albeit with some items that could potentially relate to either variations of that contract or separate contracts, the Court should not investigate further and the claim should remain valid.[6]

3 Contrast the discussion of a 'reasonable expectation of disclosure' in *Demagogue Pty Ltd v Ramensky* (1992) 39 FCR 31 at 32 and 41 and *Miller & Associates Insurance Broking Pty Ltd v BMW Australia Finance Ltd* (2010) 241 CLR 357 at 369–70.

4 Section 67U of the *Queensland Building and Construction Commission Act 1991* (Qld).

5 Most notably *Matrix Projects (Qld) Pty Ltd v Luscombe Builders* [2013] QSC 4 at [17]–[20].

6 Most notably *TFM Epping Land Pty Ltd v Decon Australia Pty Ltd* [2020] NSWCA 93 at [18]–[23], [90]–[92]; *Façade Designs International Pty Ltd v Yuanda Vic Pty Ltd* [2020] VSC 570 at [36], [39]; *Gantley Pty Ltd v Phoenix International Group Pty Ltd* [2010] VSC 106 at [129]–[132].

In the case at hand, the Court preferred Bothar's position. It was noted that, if Ausipile's position was accepted, a claimant under the Act could ensure the validity of its payment claims no matter the reality of the situation simply by making sure the claims, on their face, related to only one contract.

The whole of Payment Claim 6 was therefore held invalid. No part of the claim could be severed to preserve the validity of the remainder.[7] Bothar succeeded on its third defence, and Ausipile's application for summary judgment under the Act was dismissed.

## Conclusion

The case offers an important reminder that parties to construction contracts ought to remain well informed of their rights and obligations under the security of payment regime. While Bothar was ultimately successful in establishing its third defence, it failed on its first and second defences in part because its project manager had acted in ignorance of the law, putting Bothar in a position where it faced an uphill battle proving misleading or deceptive conduct or a variation to the payment terms in the subcontract.

In a similar manner, however, Ausipile's case was undone by its failure to appreciate that the Act required a payment claim to be made in respect of only one contract. Even if a payment claim seems on its face to relate only to one contract, courts can nevertheless find, after inquiring (for example, into items in the claim purportedly concerning variations) that the claim impermissibly arises out of multiple contracts. Parties preparing such claims should take care to distinguish between items relating to separate contracts to ensure that their claims are not held invalid.

https://www.sclqld.org.au/caselaw/QSC/2021/39

7 At [283]. Contrast *Constructpro Pty Ltd v Maicome Pty Ltd* [2014] VCC 1719 at [55]–[59].

# ACP Properties (Townsville) Pty Ltd v Rodrigues Construction Group Pty Ltd

[2021] QSC 45

### Key takeaways

An adjudicator's failure to recognise a valid payment schedule, and consequential refusal to consider a respondent's adjudication response, constitutes a jurisdictional error.

Parties should exercise caution when preparing a payment schedule to ensure that it complies with the requirements under the relevant security of payment legislation.

### Keywords

Jurisdictional error in payment adjudications

## Background

This decision relates to a payment dispute between ACP Properties (Townsville) Pty Ltd (**ACP**) and Rodrigues Construction Group Pty Ltd (**RDG**). In 2019, ACP engaged RDG to undertake refurbishment works on the Townsville Transit Centre. The contract price was approximately $2.7 million.

On 4 September 2020, RDG emailed ACP a link to an invoice that RDG contended was a payment claim under the *Building Industry Fairness (Security of Payment) Act 2017* (Qld) (**Act**). The invoice was accompanied by a series of annexures, including supplier invoices, details of previously issued invoices and employee timesheets for the work completed. The timesheets did not identify the nature or type of work undertaken by the employees.

Approximately 10 minutes later, the managing director of ACP provided an email response confirming that ACP would not pay the invoice as the claimed amounts were 'clearly overruns from [RDG's] side for which [ACP] is not responsible'. On 7 September 2020, ACP sent a further email confirming its position that the 'invoices appeared to be for works within scope hence part of the $2.7m+ already paid in full'.

RDG applied for adjudication. The adjudicator decided in favour of RDG, finding that RDG's invoice was a valid payment claim for the purposes of the Act and that the two emails sent by ACP did not constitute a payment schedule.

As a result, the adjudicator did not consider ACP's emails or ACP's adjudication response in reaching his decision.

In the Supreme Court of Queensland, ACP sought to set aside the adjudicator's decision on the basis that it was affected by jurisdictional error. ACP argued that the adjudicator's decision should be declared void because:

- the invoice and documents RDG sent September 2020 did not meet the requirements of a payment claim under section 68(1)(a) of the Act as they did not identify the construction work or related goods and services to which the payment claim related; and
- the adjudicator's failure to recognise ACP's 4 and 7 September 2020 emails as payment schedules constituted a jurisdictional error.

As a consequence, ACP contended that the adjudicator also failed to consider ACP's adjudication response in breach of his statutory requirements under the Act.

## Issues

The Court considered the following issues:

- whether the invoices and documents sent by RDG constituted a valid payment claim;
- whether either or both of ACP's emails constituted a valid payment schedule; and
- whether the adjudicator had made a jurisdictional error and, if so, what consequences followed.

## Decision

### Issue 1 — was there a valid payment claim?

Bradley J found that the invoice and documents sent by RDG did constitute a valid payment claim. ACP contended that the invoice was not a payment claim because it did not meet the requirement in section 68(1)(a) of the Act that it be a document that 'identifies the construction work or related goods and services to which the progress payment relates'.

ACP argued that the invoice was deficient because:

- despite attaching timesheets of ADG's employees, the invoice failed to identify the specific nature or type of work undertaken by the employees;
- the invoice and supporting supplier invoices lacked sufficient detail, including where and when the works were done, and did not identify the particular obligations in the contract to which the works related; and
- the inclusion of all previous invoices in the new invoice was oppressive, as a large amount of material had to be processed in a short amount of time, which ought not to be tolerated by the Court.

In relation to the timesheets, the Court found that it was sufficient that they specified the dates, times and hours worked by RDG's employees. The Court stated that 'the inclusion of the timesheets and their relevant amounts in the RDG Invoice was plainly an assertion that the work done by those of its employees at those times, on those days, for those hours, was work on the project'.

Taking into account the relatively modest amount claimed in the invoice (under $4,000), the Court considered that providing the employee timesheets was sufficient to identify the basis of the claim and allow ACP to reasonably comprehend and form a judgment as to whether it should pay or reject the claim.

As to the detail of the work completed, the Court held that RDG was not required to reconcile the amounts claimed in the invoice with a specific contractual obligation. The relevant section of the Act did not require a payment claim to pick up contractual requirements entered into between parties.

Finally, the Court found that the inclusion of all previously issued invoices in the payment claim was not oppressive. While the work involved in considering and responding to a payment claim can be considerable, RDG should have expected to have to exert itself to monitor, review and consider payment claims against the contract and other information relevant to the progress, sufficiency, completeness and quality of the work.

In light of the above, the Court held that the invoice was sufficiently detailed to constitute a payment claim within the meaning of the Act.

### Issue 2 — did ACP issue a valid payment schedule for the purposes of the Act?

RDG argued that the emails from ACP were not valid payment schedules because they failed to state what ACP was prepared to pay and reasons for paying less than claimed.

The Court found that both emails made clear that ACP considered that no amount was payable. The emails also set out the reasons for ACP's refusal to pay, namely that the contractual arrangement was capped at a specific amount and that ACP had already paid RDG more than the cap.

Accordingly, the Court found that each of the emails from ACP was a payment schedule and the adjudicator's conclusion to the contrary was in error.

### Issue 3 — did the adjudicator make a jurisdictional error, and what flowed from that?

Because the adjudicator concluded that ACP had not issued a payment schedule, the adjudicator took the view that he was not obliged to consider ACP's emails or ACP's adjudication response. In both these respects, the adjudicator was in error. Section 88(2)(d) of the Act required the adjudicator to consider the payment schedules in deciding the adjudication application. As a consequence of his first erroneous decision, the adjudicator had also wrongly excluded ACP's adjudication response in making his decision.

The Court stated that the adjudicator's error was one that affected the adjudicator's jurisdiction to determine the adjudication application and had led the adjudicator to act contrary to the obligations set out in section 88(2) of the Act. The failure to consider the payment schedules in deciding the adjudication application was a jurisdictional error because 'the adjudicator lacked authority to decide an adjudication application, where a payment schedule existed and was relied on by the respondent to the application, other than by reference to that payment schedule'. [1]

The adjudicator's failure to consider the payment schedules and consequential refusal to consider the adjudication response made the adjudicator's decision void for want of jurisdiction and of no effect.

## Conclusion

This decision provides three important reminders:

- the form requirements for payment claims in Queensland are relaxed. A document will constitute a payment claim as long as it complies with the requirements of section 68 of the Act, namely identifying the work or goods supplied, stating the amount of the progress payment and requesting payment. In this case, an invoice with supporting timesheets and supplier invoices sufficed;
- principals should take care when preparing responses to payment claims so as to avoid potential arguments as to whether a response is or is not a payment schedule. Ideally, principals should prepare one considered payment schedule response to a payment claim rather than multiple informal responses; and
- an adjudicator's failure to consider a valid payment schedule or a valid adjudication response will constitute a jurisdictional error and any adjudication determination consequent on such error will be void.

https://www.sclqld.org.au/caselaw/QSC/2021/45

1 At [39], citing *Heavy Plant Leasing Pty Ltd v McConnell Dowell Constructors (Aust) Pty Ltd* [2013] QCA 386 at [59] (Muir JA).

# Western Australia

# Payment security for subcontractors? WA Parliament passes the *Building and Construction Industry (Security of Payment)* Act 2021

### Key takeaways

A new building and construction Act passed in the WA Parliament is set to implement sweeping changes to security of payment laws and bring the State more in line with most other Australian jurisdictions.

Parties should appropriately amend their precedent contracts, including to ensure payment provisions align with the new arrangements. They should also implement updated policies and systems within their operations to ensure compliance with the new legislation.

### Keywords

WA Security of Payment Act

## Facts

The Western Australian Parliament has passed the *Building and Construction (Security of Payment) Act 2021* (WA) (**Act**). The Act will implement sweeping changes to security of payment laws, bringing Western Australia more in line with most other Australian jurisdictions. Most notably, the *Construction Contracts Act 2004* (WA) (**CCA**) will no longer apply to new construction contracts.

## Issues

### History, commencement and transition

The Act aims to provide better payment protections to contractors working in Western Australia's construction industry, with a view to ensuring contractors get paid on time, every time. It also implements a number of recommendations from Adjunct Associate Professor John Fiocco's report to the Government on security of payment reform in Western Australia.

A draft exposure bill was released in June 2020. A revised version of that bill was passed by the Legislative Assembly on 10 November 2020 but lapsed following prorogation of Parliament prior to the State election. The reforms have now come sharply back into focus with the recent collapse of Pindan triggering calls for the government to take urgent action to protect subcontractors.

The operative provisions of the Act will commence on dates to be proclaimed by the Western Australian Government.[1] Different parts of the Act may commence at different times.

### Key changes

The Act is substantially the same as the bill that was considered by Parliament in 2020. We summarise the key areas of reform below.

### Progress payments and payment schedules

Parties that carry out or undertake to carry out construction work, or to supply related goods and services, will have a statutory right to receive progress payments and to make a payment claim every month (or more often if provided for in the relevant contract). This is consistent with the position in other states.

The due dates for payment of progress payments will vary depending on the parties involved:

1 Limited provisions regarding the authorisation of the nominating authorities of adjudicators commenced on the day after Royal Assent.

- principal to head contractor: due 20 business days after a payment claim is made;
- principal to non-head contractor: due 25 business days after a payment claim is made; and
- contractor to subcontractor: due 25 business days after a payment claim is made.

For home building work, payment is due on the date provided for in the contract or, if silent, 10 business days after a payment claim is made (noting that the Act will not apply to residential construction contracts for less than $500,000).

If the construction contract provides for a shorter payment period, that period will apply.

A party must respond to a payment claim within 15 business days after the payment claims is made, unless an earlier time is provided for by the contract. The payment schedule must include reasons for not paying a claimed amount.

### Reforming the payment dispute adjudication process

The adjudication process in this Act is more consistent with those in most other Australian jurisdictions. The provisions are broadly similar to that of the CCA, with some key differences, including:

- introducing a requirement to provide notice of intention to apply for an adjudication where a response to a payment claim is not provided;
- shortening the timeframe to bring an adjudication application to 20 business days following the payment claim and response procedure (including provision of any notice of intention to apply for an adjudication); and
- providing a new review process.

Consistently with the CCA position:

- respondents will have 10 business days to respond to an application; and
- the adjudicator will have 10 business days to make their determination, unless a longer period is agreed by the parties (up to a maximum of 30 business days).

### Regulating certain contract terms

The Act introduces 'unfair time bar' provisions, providing an arbitrator, adjudicator, court or expert appointed by the parties with the power to declare void any notice-based time bar provision that it deems to be unfair. 'Pay when paid' provisions will continue to be prohibited and have been expanded to include specific provisions that are contingent or dependent on the operation of another contract.

### Creating deemed trusts for retention money

This scheme aims to provide security for builders, contractors, subcontractors and suppliers if their immediate contractual counterpart becomes insolvent. Retention money trust accounts will be required for all construction contracts that exceed the prescribed retention money threshold. This threshold will be prescribed by the regulations which have yet to be drafted, but the exposure draft indicated it would be $20,000.

### Enhancing the powers of the Building Services Board

Through amending the *Building Services (Registration) Act 2011* (WA) and the *Building Services (Complaint Resolution and Administration) Act 2011* (WA), the Act provides the Building Services Board with enhanced power to manage the commercial conduct and behaviour of registered building services providers.

### Application of the Act

The Act contemplates a broader application than the CCA by narrowing the current 'mining exception'. When it is operative, the Act will not apply to:

- building contracts with homeowners worth less than $500,000 (noted above);
- contracts between employers and employees for construction work or related goods and services;
- contracts requiring construction work to be carried out as a condition of a loan agreement with a financial institution;
- contracts to the extent it forms part of a loan, guarantee or insurance agreement with a financial institution requiring the lending or repayment of money;
- contracts where the consideration payable for construction works is not monetary consideration;
- contracts for drilling for or extracting minerals, oil and gas related works, including for constructing a shaft, pit or quarry;
- contracts to build watercraft; and
- contracts involving works where a party fails to hold a registration in contravention of the *Building Services (Registration) Act 2011* (WA).

Note: a version of this article by Spencer Flay, Tom Matthew and Brianna Dos Santos was first published online: https://corrs.com.au/insights/wa-parliament-passes-the-building-and-construction-industry-security-of-payment-bill-2021

# Overseas

# Mott Macdonald Ltd v Trant Engineering Ltd

## [2021] EWHC 754

### Key takeaways

There is no presumption that an exclusion or limitation of liability clause in a contract will not extend to deliberate or fundamental breaches of contract unless there is strong language to the contrary.

Instead, these clauses will be construed by the ordinary principles of contractual interpretation, with respect to the whole contract.

Parties intending to carve out liability for deliberate or fundamental breaches of contract from an exclusion of liability or limitation of liability clause should include express drafting to this effect.

### Keywords

Clauses limiting or excluding liability

## Facts

In 2016, Trant Engineering (**Trant**), an engineering contractor, engaged Mott McDonald Ltd (**Mott**), an engineering consultancy, to provide initial design consultancy services. Disputes arose as to whether there was a contract, the scope of works under any contract, and the amounts Mott ought to be paid for its work. The parties resolved the dispute by entering into a Settlement and Services Agreement (**SSA**).

Trant alleged that Mott deliberately refused to carry out its obligations under the SSA, such as to provide native data files, provide detailed calculations and carry out an independent review of Trant's design. Mott denied this. Trant alleged that it had to redo much of the design work due to Mott's breaches and estimated its losses at over £5 million.

Mott denied this, and further argued that even if its alleged breaches were held to be fundamental or deliberate, the exclusion and limitation of liability clauses in the SSA excluded liability or limited it to £500,000. Trant argued that, properly construed, the exclusion and limitation of liability clauses in the SSA did not extend to fundamental or deliberate breaches of contract. If Trant's construction of the clauses was accepted, Trant would be entitled to recover more than £500,000, if it could prove that Mott had breached the SSA in fundamental or deliberate ways.

The matter came before the High Court of England and Wales for summary judgment.

## Issues

### Issue 1 — how are clauses limiting or excluding liability construed generally?

The main issue was how clauses limiting or excluding liability should be construed and the extent to which they operate where there is a fundamental, wilful, or deliberate breach of contract.

Judge Eyre noted that the doctrine that exclusion clauses do not apply to fundamental breaches was rejected by the House of Lords in *Photo Production*.[1] In *Photo Production*, Lord Wilberforce stated that exclusion clauses are to be construed by the normal rules of contract law, in the context of the whole contract. Lords Diplock, Salmon, Keith and Scarman agreed with this approach.

Judge Eyre then considered two competing more specific authorities: *Marhedge*[2] and *Astrazeneca*.[3] In *Marhedge*, it was broadly held that in the absence of 'strong language' to the contrary, there is a presumption that a limitation clause is not intended to capture deliberate breaches. In *Astrazeneca*, Flaux J disagreed with this approach, holding that 'whilst exemption clauses are construed strictly, it is a question of construction of the clause whether it covers a particular breach, however that breach is categorised.'

Judge Eyre referred to Flaux J's statement in Astrazeneca that the earlier authority in *Marhedge* was 'heterodox and regressive and does not properly represent the current state of English law.' Judge Eyre then applied *Carlton Industries*,[4] which held that where two decisions set out the law differently, the later decision is to be applied. *Astrazeneca* being the later authority, Judge Eyre summarised:

> "In my judgment the correct approach is accordingly that the position remains as set out in *Photo Production* and as summarised in the *Astrazeneca* case. Exemption clauses including those purporting to exclude or limit liability for deliberate and repudiatory breaches are to be construed by reference to the normal principles of contractual construction without the imposition of a presumption and without requiring any particular form of words or level of language to achieve the effect of excluding liability."

### Issue 2 — how should the exclusion of liability clauses in the SSA be construed?

Trant argued that express language was required here to exclude or limit liability. Trant based this argument on general principles of construction, by reference to the contractual context, rather than a specific rule in respect of fundamental breaches, in line with the rejection of such a doctrine in *Photo Production*. Judge Eyre rejected Trant's arguments.

**Argument 1: that reference to the factual matrix was appropriate**

This argument was rejected. The drafting of the SSA, while imperfect, did not demonstrate that the text lacked clarity to the extent that reliance should move from the language to the factual matrix.

**Argument 2: that the limitation of liability was 'commercially nonsensical' or reduced Mott's obligations to a 'mere declaration of intent'**

This argument was rejected on two bases.

First, Judge Eyre stated that the contractual terms were 'matters of commercial balance and negotiation' and the court must be 'alert to avoid intervening to protect one or other party from the consequences of a bad bargain.'

Second, Judge Eyre's view was that a breach would still have consequences for Mott should it fail to perform. If Mott failed to perform, Trant would be able to terminate the contract by accepting Mott's repudiation, in which case Trant could be liable to pay up to £500,000.

## Conclusion

The clauses applied to any breach by Mott of the SSA. As such, the exclusion and limitation of liability clauses applied to breaches which were fundamental, deliberate, or wilful.

https://www.bailii.org/ew/cases/EWHC/TCC/2021/754.html

1 *Photo Production Ltd v Securicor Transport* [1980] AC 827.
2 *Internet Broadcasting Corporation Ltd v MAR LLC* [2009] EWHC 844 (Ch) (***Marhedge***)
3 *Astrazeneca UK Ltd v Albemarle International Corporation* [2011] EWHC 1574 (Comm) (***Astrazeneca***).
4 *Colchester Estates (Cardiff) v Carlton Industries Plc* [1986] Ch 80.

# PNG

# Shake-up of the PNG electricity supply industry

The National Parliament recently passed the *National Energy Authority Act 2021* (**Act**) and the *Electricity Industry (Amendment) Act 2021* which will introduce significant changes to the electricity supply industry in Papua New Guinea.

The legislation will come into operation in accordance with a notice in the National Gazette although there is no present indication when this will occur.

The key takeaways of the new legislation are:

1. the National Energy Authority (Authority) will be the regulator of the electricity supply industry (taking over the role currently performed by the Independent Consumer and Competition Commission);
2. a new regime of licensing, levies and fees will be introduced; and
3. new national content requirements will apply to electricity project developers, similar to those for projects in the extractive industries.

## What is the role of the new regulator?

The Authority will have a broad range of functions, including:

- administering a new licensing regime, including the collection of levies and charges;
- regulating domestic market obligation gas supplied by gas projects to the State; and
- implementing the National Electrification Roll-Out Plan to achieve the government's objective to provide electricity access to 70% of households in PNG by 2030.

## What are the new licences, fees and charges?

The Act introduces a licensing regime that is similar to that under Chapter 78 of the *Electricity Industry Act* and the *Independent Consumer and Competition Act 2002*.

A licence will be required for the generation of electricity, operation of transmission and distribution networks, and retailing of electricity. While there are some transitional arrangements for existing licensees migrating to regulation under the new Act, there may be gaps in coverage.

The new levies and charges apply to:

- **generation**: there will be a licence levy of K0.009 p/kWh, reviewable every three years. In addition, there will be a fixed annual fee ranging between K10,000 and K500,000 depending on generation capacity above 1MW; and
- **transmission and distribution networks and retail:** annual fees are to be prescribed by regulation.

In addition, the Authority must establish a tariff system (subject to public consultation) for the electricity supply industry.

## What are the national content obligations?

The Act introduces new national content obligations for electricity projects, seemingly modelled on those that apply to projects in the extractive industries. These include:

- **royalty benefits**: a royalty benefit of up to 5% of the gross annual revenue of a project to be paid to affected landowners within a kilometre of the project facilities;
- **equity benefits**: an option for governments and landowners to acquire up to a 20% equity interest (in aggregate) in the project;
- **PNG citizen company participation**: generation projects with installed capacity of up to 10 MW are reserved for PNG citizen companies, and all other generation projects must be developed in joint venture with PNG companies;
- **national content**: requirements for employment, training, business and community-development opportunities and assistance to be provided to PNG citizens; and
- **landowner identification and forums**: requirements around the identification of affected landowners, to be approved by the Minister, followed by a national content forum to discuss benefit-sharing between governments and landowners.

## Comment

The new legislation introduces new requirements for electricity projects that will significantly change the energy and electricity sector landscape in Papua New Guinea. It will be interesting to see the impact that the legislation has on businesses moving forward.

# Environment & Planning

# 2021: Climate change litigation trends and developments and what can corporations do to shield themselves

The judgment in *Bushfire Survivors for Climate Action Incorporated v Environment Protection Authority* [2021] NSWLEC 92 (***Bushfire Survivors***), handed down on 26 August 2021, is the greatest indication in Australia yet that the available scientific evidence on climate change provides a strong foundation upon which litigants will base their claims.

The decision follows a number of other domestic and international cases which demonstrate a willingness by the courts to adopt the science based evidence of climate change, link human rights to climate change and hold both corporations and governments to account against greenhouse gas emission (**GHG**) targets.

Two high profile examples include:

- the recent *Sharma v Minister for the Environment* [2021] FCA 560 (orders made in *Sharma v Minister for the Environment (No 2)* [2021] FCA 774)* (***Sharma***) judgment, in which the Federal Court of Australia held that the Commonwealth Minister for the Environment owes a duty of care to Australian children to consider the longitudinal human health risks associated with climate change when granting environmental approvals for activities which will produce significant volumes of greenhouse gases. The Commonwealth is appealing this decision. Notwithstanding the outcome of the appeal, legal challenges are likely to arise in other States and Territories, particularly given the recent announcement that the WA Conservation Council and Environmental Defenders Office are presently considering launching a test case to establish that a similar climate change duty of care exists for consent authorities under the *Environmental Protection Act 1986 (WA)*; and
- the *Milieudefensie et al. v Royal Dutch Shell plc* (***Shell***) judgment in the Netherlands with The Hague District Court ordering Shell to bring its corporate policy into alignment with the Paris Agreement and to reduce its net GHG emissions by 45% of 2019 levels by 2030.

## Emerging trends

Climate change activism is likely to manifest itself in a number of ways in the future, including:

- **actions against major greenhouse gas (GHG) emitters, seeking damages or restraining them from carrying out particular actions** – for example, if the development of a project does not align with a NetZero 2050 target, then action may be taken against that corporation to restrain it from developing that project;
- **actions against specific project approvals or extensions** – for example, a legal challenge against a decision of an authority to grant an environmental approval for the expansion of a new resource project that conflicts with any adopted international obligations to reduce GHG emissions. There is also an increasing pattern of rights based claims where the litigation is founded upon human rights or a duty of care;
- **actions against corporations and directors** – generally for failures to align corporate policy to climate change benchmarks and/or disclose material climate-related financial risks. Further, following the *Sharma* judgment and having regard to the principles in the *Shell* decision, it is not inconceivable that Australian courts could soon find that corporations owe a duty of care to Australian children to adopt appropriate frameworks and align their conduct to adopted international climate change goals, such as the Paris Agreement;
- **actions against governments, including in respect of their climate change policies, or lack thereof** – the recent Bushfire Survivors case is a primary example of this type of action. The plaintiffs commenced proceedings in the New South Wales Land and Environment Court seeking an order of mandamus compelling the NSW Environment Protection Authority (**EPA**) to 'develop environmental quality objectives, guidelines and policies to ensure environment protection from climate change' (paragraph 18 of the *Bushfire Survivors* judgment). It was argued that the statutory duty under s9(1) of the *Protection of the Environment*

*Administration Act 1991* (**POEA Act**) evidently requires the EPA to develop policies that protect the environment from the most 'grave' threat of all, being climate change. The LEC agreed that the EPA had such a statutory duty and had failed to fulfil that duty; and

- **actions brought against Government funding and grants decisions which have impacts on the operations of corporations and funding of projects** – for example, the recent Beetaloo NT Basin challenge, which is a Federal Court administrative law challenge to a decision of the Commonwealth Resources and Water Minister to provide a $21 million grant to an oil and gas company for a gas exploration project in Beetaloo Basin, NT. The grounds of challenge are that the Minister failed to make reasonable enquiries about the increased risks of climate change if gas resources in the Beetaloo Basin are developed, and the economic risks of expenditure on gas exploration projects in the context of decarbonisation and Australia's movement towards renewable energy. The matter is yet to be heard by the Court.

The significance of these developments is heightened by the release of the Intergovernmental Panel on Climate Change 6th Assessment Report in August 2021 (**2021 IPCC Report**), which provides a comprehensive global assessment of the current status and projections as to the future trajectory of climate change on the basis of the best available physical science. Significantly, the 2021 IPCC Report found that even if Net Zero is achieved globally by 2050, with negative emissions thereafter, the chance of limiting global warming to 1.5 degrees is less than 50%.

The 2021 IPCC Report is likely to be used in evidence given by experts in any litigation where climate change grounds form part of the legal challenge. It is also likely unavoidable that consent authorities, regulators and government agencies will need to consider this report when exercising their executive powers where they are linked to climate change issues.

## How can corporations shield themselves from climate change litigation?

There are various actions that can be taken to minimise the risks of legal challenge. For example, challenges to project approvals and government funding are likely to be minimised if the corporation involved has:

- made significant commitments to reducing GHG emissions;
- thoroughly considered climate change related impacts from GHG emissions in project specific environmental assessments and opportunities for reductions in emissions in an operational context, including potential offsets;
- aligned its targets with the Paris Agreement (or any new targets set); and
- put in place robust and transparent disclosure frameworks.

Further, corporate climate change risk and disclosure frameworks, where relevant, should include climate change considerations in alignment with UN recommendations. For example, any such frameworks should align with the Task Force on Climate-related Financial Disclosures (**TCFD**) global framework for the identification, assessment and financial disclosure of material climate change risks.

Collectively, the above law and policy developments underscore the need for companies to proactively and robustly engage with climate change related risks and dependencies, both within their primary operations and across their supply chain. This will involve elements of horizon scanning and adapting to climate change benchmarks as they develop. The more a corporation can be seen to be taking action, the less likely it is to be the target of any potential legal challenges.

> "On the evidence, at the current time and in the place of New South Wales, the threat to the environment of climate change is of sufficiently great magnitude and sufficiently great impact as to be one against which the environment needs to be protected.
>
> Chief Justice Preston

# Is Australia ready for electric vehicles?

While only comprising around 1% of new car sales, electric vehicles (**EVs**) are now a policy priority. This year alone, governments in Victoria, New South Wales and the ACT have all announced subsidies for EVs, while the Queensland government is progressing its Electric Super Highway.

But are we ready for them? EVs are projected to account for at least 30% of Australia's vehicle fleet by 2040, but Australia currently has less than 2,500 charging stations. Combatting 'range anxiety' will be key to driving consumer demand for EVs – as such, planning authorities must consider what planning measures can be implemented to accelerate the roll out of EV charging infrastructure.

## Key points

- Car parks and service stations are prime locations to provide EV charging infrastructure;
- existing planning controls do not require EV charging infrastructure to be provided and, in the case of service stations, contain assessment criteria that are irrelevant to EVs; and
- local governments need to consider whether current planning instruments sufficiently accommodate electric vehicles.

## Where will the infrastructure go?

At the moment, EV charging stations are typically small-scale, servicing a few vehicles. If EVs are to become the dominant form of private transport, large-scale charging infrastructure will be needed.

There are two obvious existing land uses that could easily be converted to cater for this: car parks and service stations.

### Car parks

Whether returning home, going to a shopping centre or visiting friends, EV drivers will want to ensure their car is sufficiently charged for their next journey. Installing charging infrastructure in car parks offers convenience for consumers, without compromising existing land use.

Installing this infrastructure will, of course, come at some cost, and governments are unlikely to be able afford all of it, or gain access to private car parks to install it. Developers and building owners will need to contribute, particularly for high rise apartment and commercial developments, where residents and tenants will otherwise have limited ability to connect their vehicles to power themselves. Planning authorities should consider whether their planning schemes include requirements for the provision of charging infrastructure.

Developers may reasonably ask why they should bear the cost of this infrastructure when EV uptake remains low. Achieving consensus between different levels of government and industry on what infrastructure should be provided will be key to ensuring an effective, uniform roll out.

### Service stations

For travellers or commuters using EVs, who may not have access to the charging facilities that they would at home or work, service stations present a convenient alternative.

However, traditional environmental and planning controls for service stations are often unsuitable or irrelevant for EV charging stations. Such planning controls and conventions include:

- contamination controls: traditional service stations are well-known to pose risks of contamination. As such, service stations are often sited away from 'sensitive uses', such as residential or educational sites. EV charging stations do not pose a similar risk of contamination;
- noise and air emissions controls: service stations are generally required to meet noise and air quality criteria, to minimise their adverse amenity impacts on nearby land uses. EV charging infrastructure will not emit odours as petrol stations do and EVs are significantly quieter than internal combustion engine vehicles. These benefits will, however, need to be balanced against additional noise generated by consumers if they are spending longer periods at the service station (discussed below); and
- co-located uses: service stations are often co-located with facilities aimed at providing 'convenience', such as fast food and convenience stores. This is largely because consumers will spend only a short time at a service station. However, without significant reduction in charge times, current EV charging technology will require customers to spend more time at a service station while 'filling up'. Therefore, service stations may be more appropriately co-located with cafes, restaurants (rather than fast food), retail, public spaces or tourist amenities to enhance drivers' charging time.

## Policy ideas for planning authorities

Given that current provisions do not adequately provide for, or encourage, the implementation of EV charging infrastructure, planning authorities may consider the following ideas to facilitate and accelerate the roll out:

- potentially introducing a new definition for a 'charging station', which could be clearly distinguished from a 'service station'. This would then also allow planning authorities to introduce new, EV-relevant assessment criteria into their planning schemes;
- alternatively, authorities may consider lowering the level of assessment (including removing redundant assessment criteria) for 'service stations' that cater solely to EVs (and again introducing new, EV-relevant assessment criteria);
- reducing compliance costs for building approvals, where developers seek to install charging infrastructure into existing buildings;
- introducing requirements in planning schemes requiring the provision of EV charging infrastructure, particularly for medium and high density residential and commercial developments;
- using infrastructure charges to fund the government-provided EV charging infrastructure which, in time, could be an alternate government revenue source; and
- requiring new petrol service stations to be designed so that they can be easily repurposed as EV charging stations in future.

Inadequate charging infrastructure remains one of the key barriers to EV use in Australia. Setting up the right planning controls now will help overcome that.

# How emerging US environmental trends and initiatives may impact Australian law and policy

From his first moments as President of the United States, Joe Biden has embarked upon a process of creating the most comprehensive environmental justice platform of any American president in history.

Some of his very first executive orders set out the overarching climate change and environmental policy of the Biden Administration:

> " … to listen to the science; to improve public health and protect our environment; to ensure access to clean air and water; to limit exposure to dangerous chemicals and pesticides; to hold polluters accountable, including those who disproportionately harm communities of colour and low-income communities; to reduce greenhouse gas emissions; to bolster resilience to the impacts of climate change; to restore and expand our national treasures and monuments; and to prioritise both environmental justice and the creation of the well-paying union jobs necessary to deliver on these goals." (Executive Order 13990, 20 January 2021)

Despite the geographic distance between our two countries, developments in American environmental law have long influenced Australia. As noted by many academics, 'Australia and the United States share a tradition of cooperation with respect to environmental matters.'

America's *National Environmental Policy Act, Endangered Species Act* and *National Historic Preservation Act* were influential in the conceptualisation and drafting of Australia's *Environment Protection and Biodiversity Conservation Act 1999* (Cth). Likewise, the *Clean Air Act* and *Clean Water Act* were key considerations in the development of the *Protection of the Environment Operations Act 1997* (NSW) and *Contaminated Land Management Act 1997* (NSW).

It follows that any formative legislative and policy changes implemented by the Biden Administration may go on to shape the trajectory of Australian environmental and climate change law.

## Key takeaways

In this respect, there are currently five key US environmental justice trends that will have relevance to Australian law and policy in the future and, in many respects, already are:

- **scientific evidence**: an emphasis on consideration of scientific evidence in policy development and decision-making;
- **commitment to international obligations**: a commitment to international treaty obligations and climate considerations infiltrating all parts of law and policy;
- **environmental justice**: emerging environmental justice considerations in decision making which links public health, social costs and climate change;
- **federal environmental regulation**: a focus on federal environmental regulation, as opposed to regulation at a state level; and
- **clean energy**: the emergence of development of clean energy infrastructure as a key federal policy objective.

The evolving position in the United States may have a number of implications for Australia:

- increased focus on climate change issues and Paris Agreement treaty obligations as a component of America's foreign policy may lead to heightened external pressures on Australia to take more pronounced executive and legislative action on climate change;
- a shift towards consideration of scientific evidence being an integral part of executive, regulatory and judicial decision-making in America may be influential in Australian decision making. For example, Australian courts may be more willing to accept scientific evidence on climate change when making determinations in relation to legal challenges to approvals or decisions linked to developments of significant environmental impact;

- the developing area of environmental justice may begin to grow as the basis for refusal of projects, objections and legal challenges to developments (including expansion of existing developments). Certainly, the 'right to health' concept is gathering momentum, which is evidenced by the recent decision in *Sharma v Minister for the Environment* [2021] FCA 560, the final orders for which are available here (noting the Commonwealth intention to appeal the decision); and
- forthcoming US climate policy, executive and regulatory action, and any relevant judicial commentary, may form important precedents for decisions on similar issues in Australia and may go on to be integrated into Australian environmental law jurisprudence.

## Emphasis on scientific evidence

The terms of President Biden's Executive Order on 'Protecting Public Health and the Environment and Restoring Science To Tackle the Climate Crisis', quoted earlier, placed a clear emphasis on the consideration of robust scientific evidence as an integral component of environmental decision-making and policy development.

This has been further signalled in part by President Biden's nominations for key environmental law and policy leadership roles, which appear to be focussed on bolstering the role of scientific evidence and environmental justice considerations in all aspects of federal governance. Key nominations and appointments include the:

- appointment of Michael Regan as Environmental Protection Authority (**EPA**) Administrator. As noted by the American Bar Association, Regan possesses a wealth of prior experience not only as an EPA staffer, but also as an air-quality specialist;
- appointment of Gina McCarthy as National Climate Advisor, within the new White House Office of Domestic Climate Policy. Formerly director of the Harvard Center for Climate, Health and the Global Environment and EPA Administrator, McCarthy possesses specialisations in public health, social anthropology, and environmental health engineering, planning and policy. As articulated by Harvard, the focus of McCarthy's work will be the translation of 'evidence-based policy into action to improve health for all' on a federal level;
- appointment of John Kerry as President's Special Envoy for Climate Change. As Secretary of State under the Obama Administration, Kerry played a prominent role in the negotiation of the Paris Agreement. In his new capacity as Special Envoy, Kerry has articulated a particular focus on taking national and international measures to 'hold the Earth's temperature increase to the Paris' stated 1.5 degrees' with a key environmental justice focus in mind as 'a 3.7 to 4.5 increase centigrade, which is exactly the path we are on now invites, for the most vulnerable and poorest people on Earth fundamentally, unliveable conditions'; and
- nomination of David Uhlmann for Assistant Administrator for Enforcement and Compliance Assurance (EPA). Uhlmann is the director of the Environmental Law and Policy Program at the University of Michigan Law School, and prior to this was Chief of the Environmental Crimes Section of the Department of Justice. Recognised as the most preeminent environmental crimes prosecutor in America, the White House has noted Uhlmann's extensive background in 'environmental stewardship', 'corporate sustainability programs', and 'prosecuting polluters aggressively and fairly'.

## Renewed commitment to international treaty obligations

President Biden has expressed a clear stance on America's international treaty obligations from the outset of his administration, re-joining the Paris Agreement and on 27 January 2021, creating a Special Presidential Envoy of Climate. This new position in the Executive Office of the President, held by John Kerry, has a focus on the development of energy and climate policy.

These executive actions have been accompanied by a shift in the political discourse surrounding climate change. President Biden's Executive Orders reframe climate change as a 'climate crisis' accompanied by 'profound public health and economic crises' which require immediate action.

Secretary of State Antony Blinken likewise positioned the climate crisis as an external threat and a focal point of foreign policy and national security decision-making within the Administration.

In his recent speech on climate leadership, Blinken stated the current global conditions mean 'taking into account how every bilateral and multilateral engagement - every policy decision – will impact our goal of putting the world on a safer and more sustainable path. It also means ensuring our diplomats have the training and skills necessary to elevate climate in our relationships around the globe'.

This emerging American priority of utilising international relations to place climate action on the global agenda was also evident in President Biden's convening of the Leaders' Summit on Climate in April 2021, ahead of the UN Climate Change Conference (**COP26**) to be held in Glasgow in November 2021.

Climate considerations are increasingly infiltrating all aspects of government and decision making, a priority clearly set out in President Biden's Executive Orders. Indeed, as noted by John Kerry, President Biden's Order of 20 January 2021 positions climate as an 'all-of-government enterprise', instructing 'every single [Cabinet and] agency officer to comprehensively factor climate consequences into every decision'.

This has been reflected by the approach adopted by Kerry and McCarthy as Special Envoy for Climate and National Climate Advisor respectively. Their offices recently undertook a 'government-wide assessment.. sector by sector – electricity, transportation, building, industry, and lands and oceans' of opportunities to combat climate change.

As articulated by McCarthy: 'We see multiple pathways across all sectors, across all policy levers, across federal and state and local actions to grow our economy and reduce our emissions'.

Collectively, this suggests America may be likely to increasingly pursue alignment on climate action both internally, within the Cabinet and Government Agencies of all levels, and externally between itself and its international allies.

## Environmental justice: linking public health and climate

President Biden's Executive Orders on climate have linked public health and climate considerations. This forms a foundation of the environmental justice movement in the US and seeks to acknowledge that climate change has direct public health implications for both present and future generations.

The EPA has defined environmental justice in the American legal context as 'the fair treatment and meaningful involvement of all people regardless of race, colour, national origin, or income with respect to the development, implementation and enforcement of environmental laws, regulations and policies'.

In pursuing environmental justice actions, the EPA has indicated that it will give specific consideration to:

- public health;
- cumulative impacts;
- social costs; and
- welfare impacts.

Climate action has been framed as essential from a human rights and 'right to health' perspective, a position supported by judicial commentary in decisions such as *Aji P. v. Washington*. In this case, the Washington Appellate Court dismissed an action alleging a right to a clean environment and stable climate on the basis that the remedy sought, a court order requiring Washington State to develop an enforceable state climate recovery plan, would be a violation of the separation of powers.

However, in its decision the Court provided extensive judicial commentary recognising the harm that greenhouse gas emissions pose to the environment, the future stability of the global climate, and human health, agreeing that a right to a stable environment is fundamental.

Such developments are already somewhat mirrored in Australia, with the Federal Court's recent determination that the Commonwealth Minister for Environment owes a duty of care to Australian children to protect them from the long-term risks to human health and life posed by climate change. This decision was analysed in detail by our team in our recent Insight piece.

## Emerging federal model of regulation

Environmental justice action and environmental regulation has previously primarily occurred in America at a State level. However, President Biden has recently taken action to create a White House Office of Climate Policy led by Gina McCarthy, the former EPA Administrator under President Obama.

McCarthy is charged with developing and leading an 'all of government' approach to climate change. Alongside the creation of the President's Special Envoy for Climate Change, this suggests that these two new offices, in conjunction with the EPA and Department of Justice, will go on to play key regulatory roles.

The question arises as to whether the EPA will remain the key regulator and administrator of climate policy in this space, or whether a new model will emerge. This is likely to become clear with the Administration's release of its first proposed budget for the EPA prior to 30 September 2021.

## Focus on development of clean energy infrastructure

President Biden announced a new set of Paris Agreement nationally determined contributions (**NDC**s) for the United States at the Leaders' Summit on Climate Change, including the achievement of a carbon pollution free power sector by 2035 and net-zero by 2050. Immediate action has been taken by President Biden towards the development of clean energy infrastructure, including:

- the issue of a directive to the EPA to develop new regulations around the monetisation of value of changes in levels of greenhouse gas emissions;
- announcement of an economic package to boost investments in clean energy, including carbon pricing measures and the subsidisation of renewable energy;
- articulation of a new policy position which has brought an end to international financing of fossil fuel based energy in America; and
- the issue of an Executive Order terminating the Keystone Pipeline Permit and placing a moratorium on oil and gas exploration on federal lands.

However, the traction these executive actions will make has been questioned by the American Bar Association in light of the clash between the policy position of the Biden Administration and the Supreme Court.

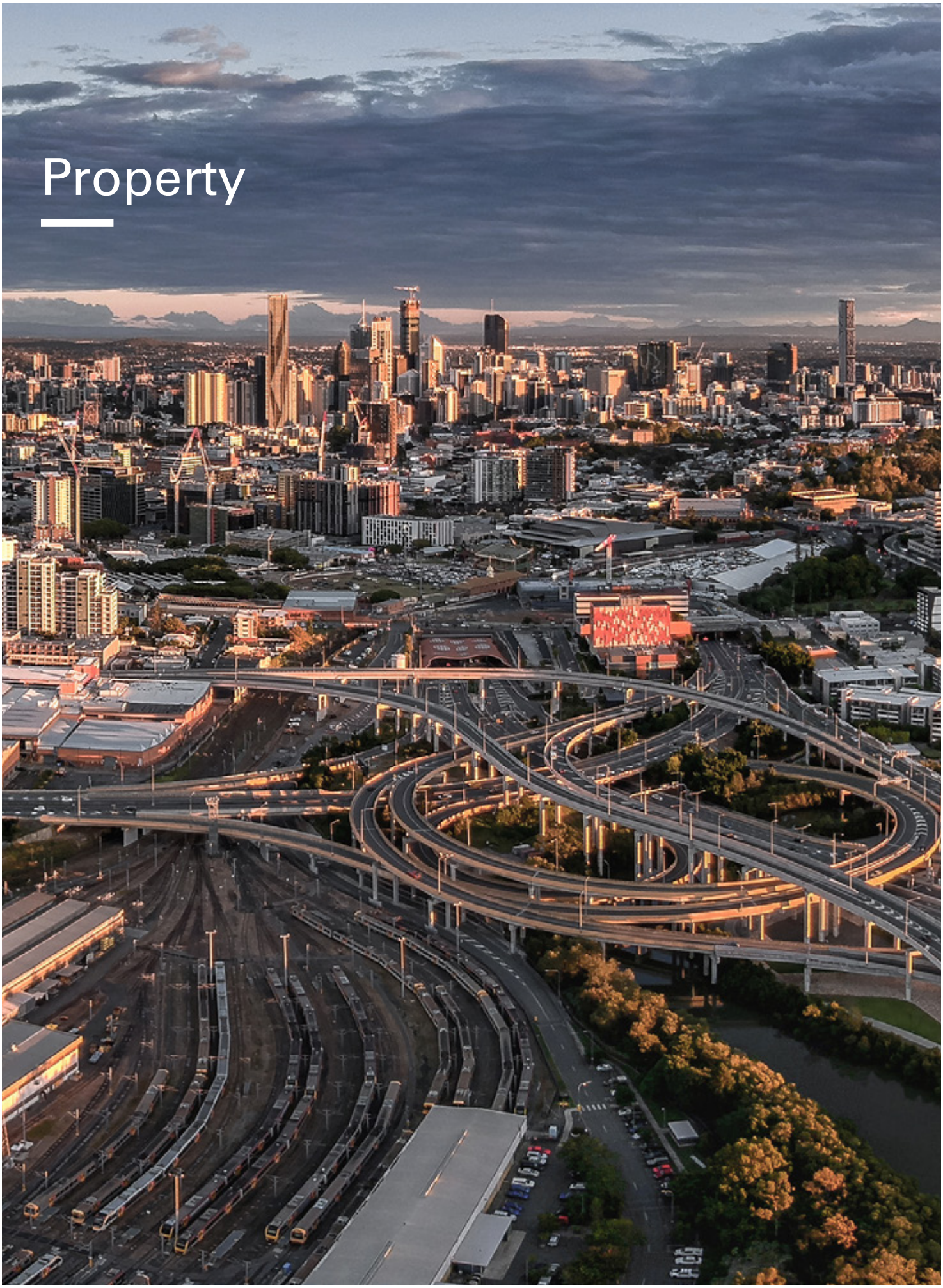
Any steps taken by the EPA on climate issues that occur 'without the backing of new legislative action will undoubtedly be met with legal challenges… leaving its fate to the courts'.

Indeed, the American Bar Association notes that there remains no Democratic majority in the Senate, meaning: 'The viability of any subsequent efforts to advance climate policy through Congress may be limited by the balance of power, which is likely to remain under split party control.'

## Conclusion

Overall, there has been a seismic shift in American climate change and environmental policy in the last six months which is likely to have significant implications for Australia. These implications may not be immediate, however given the Net Zero commitments made by President Biden and the whole-of-government approach to climate change, the pressure on Australian legislators and policy makers is likely to grow. The outcomes of COP26 will no doubt amplify this pressure.

# Property



# De-risking and future-proofing commercial leases

As the workforce recovers from the impacts of 2020 and more people realise the productivity and lifestyle benefits of working away from traditional offices, commercial tenants are increasingly rethinking their future space requirements.

De-risking and future-proofing commercial spaces – having regard to both the physical environment and how offices can be used to drive workplace strategy – will be front of mind for many, as will making offices places to collaborate, innovate, problem-solve, connect and socialise, in line with shifting culture expectations.

Simple lease renewals and conventional fitouts are giving way to deals involving increased space flexibility, utilisation of versatile co-working or 'third' spaces in buildings and adaptability in fitout design and delivery. Tenants are achieving their post-COVID strategic planning requirements through either sourcing new space where they can start with a clean slate, or 'staying put' but collaborating with their landlords to bring forward lease negotiations, enabling them to right-size their space and fitout requirements, frequently in return for an extended lease term.

## Space flexibility will guide deals

As hybrid working and the growth of collective spaces in buildings paves the way for the potential to change space requirements, commercial tenants are seeing the need to incorporate space flexibility into their leasing deals. Some key mechanisms through which commercial tenants may implement space flexibility include:

1. **planning and starting early**: a lease renewal or search for new premises should commence well ahead of the tenant's lease expiry. The tenant's ability to negotiate better outcomes will be enhanced by the tenant determining its needs and requirements early. Owners are better placed to accommodate expansion and contraction rights and rights of first refusal for anchor tenants or tenants that are engaged in early pre-commitment deals. Tenants will of course need to find a balance between going to market early and the risk that early market engagement will require a tenant to, absent a flexible arrangement, prematurely 'lock in' its requirements;
2. **expansion and contraction rights**: expansion and contraction rights allow tenants to change their leased area due to evolving business needs. These rights are negotiated by tenants who anticipate changes in their future office space requirements, with key considerations being:
    - the ability of the landlord to lease expansion space when not used by the tenant;
    - when the right may be exercised and the length of notice;
    - the condition of the premises and status of fitout;
    - the amount of additional or reduced rent and incentive; and
    - other higher ranking expansion rights granted by the landlord; and
3. **rights of first refusal**: rights of first refusal are a feature of larger leases and they compel a landlord to offer a lease to a tenant before leasing available space. There are myriad ways to structure rights of refusal. Ideally the lease terms would align with the tenant's existing lease, although the commercial terms such as the rent would be at market rates at the time.

Space flexibility comes at a cost, as landlords need sufficient certainty to lease the balance of their buildings. Tenants will need to plan their space requirements carefully by reference to their organisation's unique hybrid working behaviours.

## Greater adaptability in fitout design and delivery

Greater adaptability in fitout design and delivery are anticipated to become a feature in post-COVID builds to accommodate last minute modifications consequential on rapidly changing local conditions. This may lead to fewer integrated fitouts, as tenants seek to separate their ever-changing space requirements from base building specifications.

In the immediate future, developers may also seek to negotiate additional contingencies in anticipation of future COVID outbreaks. A further challenge arises in the context of regulatory and legislative change in relation to density and social distancing requirements.

The need for flexibility will impact on both the scope and nature of the works, and the delivery model / contract form. Adaptable fitout delivery and design is likely to require or allow for:

- fewer fixed walls to allow spaces to be reconfigured;
- flexible proportions of office, co-working, quiet and client engagement spaces;
- fewer features impacting the base build (for example, voids);
- minimum technology requirements to facilitate connection with remote workers;
- prioritising occupant health in fitout design by creating well-ventilated, natural light-permeated and green office spaces with enhanced hygiene measures; and
- prioritising wellbeing facilities such as gyms, cafes, retail and end of trip facilities.

Fitout contracts will need to contain robust and carefully considered variation provisions to enable reconfiguration of design to adapt to changing circumstances, with close attention being paid to building in (and fixing) time and cost contingencies.

Tenants may seek closer involvement in, and more control over design outcomes, trade contractor selection and (to protect against insolvency risk) direct avenues of recourse to suppliers and subcontractors. Design and construct, which for many tenants is procured on a 'set and forget' basis, may give way to different structures, in particular managing contractors with a guaranteed maximum price, and tenants who want complete control may engage in construction management.

# Banking & Finance

# Electronic execution of documents under the Corporations Act reinstated

After months of uncertainty following the lapse of the *Corporations (Coronavirus Economic Response) Determination (No. 3) 2020* (Cth) on 21 March 2021, legislation has now been passed to reinstate the previous COVID-19 relief allowing for electronic execution of documents under section 127 of the *Corporations Act 2001* (Cth) (Corporations Act). The return of the relief will be welcomed by many as we wait for this temporary measure to be made permanent, potentially later this year.

## Background

The details of the relief are set out in the *Treasury Laws Amendment (2021 Measures No. 1) Act 2021* (the **Act**), which was passed by both houses of the parliament on 10 August 2021 and received Royal Assent on 13 August 2021. The Act amends section 127 of the Corporations Act to permit:

- split execution – i.e. allowing for two directors (or one director and company secretary) to sign documents separately in counterparts who, without the relief, would have been required to sign the same physical copy; and
- use of technology neutral methods in executing documents including by way of electronic signatures.

In relation to split execution, it is important to note that each counterpart must contain the entire contents of the document. This is to ensure that all parties to the document are signing on the same terms, but it does not mean that the parties need to print or sign every page of the document.

In relation to the method of executing, while the Act does not mandate the use of any particular technology, the method chosen must sufficiently identify the person signing the document and indicate their intention to sign. The method must also be:

- as reliable as appropriate for the purpose for which the document was generated or communicated; or
- proven in fact to have indicated the person's identity and intention to sign.

## Comment

For methods of executing documents electronically, we previously have and continue to recommend using an electronic platform such as DocuSign given it is able to satisfy all elements of identification, intention and reliability. Properly set up, these electronic platforms are easy to use, provide clear execution and will generally be accepted by the courts.

Of course, under the new rules, the methods by which a company may execute its documents are not restricted; provided the company observes the aforementioned requirements.

The relief granted under the Act is set to expire on 1 April 2022, but the government has foreshadowed that it will introduce more permanent changes later this year.

# Projects

# Supply chain shortages continue to impact construction

Almost 18 months after the first COVID-19 lockdown in Australia,[1] domestic construction projects are feeling the ongoing impact of supply chain shortages, cost escalation and shipping delays.

Australia's manufacturing sector has declined as a share of the overall economy over the last 30 years with the result that the construction industry is heavily reliant on off-shore materials, products and supplies.

As 2020 unfolded and the impacts of the pandemic began to bite, the main focus for contractors, developers and principals was three fold:

- identifying contract entitlements to recover time and costs in relation to delay caused by site shutdowns;[2]
- working to strengthen site safety and hygiene;[3] and
- ensuring interrupted projects were completed as quickly as possible.

In 2021, there have been different challenges. Contracting parties who have worked hard to build the existing constraints on project delivery into their pricing, programming and planning[4] are discovering that the global supply chain impacts are presenting an intractable problem, at least in the short term.

Contractors who have seen their projects delayed over the last year are understandably seeking to find ways to protect themselves. In turn, owners are seeking to protect themselves against the risk of a program being blown up by unpredictable shortages.

The challenges are manifesting themselves in a number of ways:

- contractors seeking an express right to recover any increase in ocean freight fees which have increased by some accounts by more than 50% due to a multitude of factors, ranging from a shipping container shortage, strong demand for domestic items as a result of global stay at home orders and competition from the US and Europe;
- for the first time in many years, we are seeing contractors ask for rise and fall provisions to be included in their contracts. In turn, contractors who bid for a job are finding their subcontractors are seeking to increase their costs in the period of time between tender submission and contract sum finalisation;[5]
- contractors seeking extensions of time for any delay in delivery caused by delays in international ports. This concern arises in part from recent issues in China, when ports in Shenzen and Ningbo were closed down due to COVID-19. Also widely reported has been an import timber shortage.[6] Other ports, such as Los Angeles, have seen extensive delays in unloading and loading containers due to ongoing COVID-19 outbreaks amongst port workers; and
- extensive manufacturing delays, resulting in contractors seeking time and costs for delay in manufacturing and delivery of specific items, in particular timber,[7] windows, steel products and doors.

1 12 March 2020. International borders were effectively closed by the Federal Government on 20 March 2020.
2 In most cases these claims took the form of a change in law claim or were made under a force majeure clause, if one existed in the project contract.
3 Resulting in industry agreed guidelines, for example those agreed by Victorian construction unions, and industry and employer bodies.
4 Driven by directives issued under public health legislation in each of the states and territories, relating to matters such as social distancing, wearing PPE, testing, screening and isolating positive COVID-19 cases.
5 The Master Builders Australia Survey report for June states the tightest supply pressure relates to bricklayers, carpenters, concreters, electricians and floor finishers.
6 Demand for timber has in turn been affected by a local residential construction and renovation boom, and forest losses in the 2020 summer bushfires.
7 91% of the respondents to the MBA Survey indicated timber supply delays.

How does one allocate or allow for the risk of these kinds of eventualities and still ensure some cost and time certainty? Whilst there is no perfect solution, some options for a principal to a construction contract include the following:

- agreeing to grant time for off shore (or domestic) supply chain delays. Any entitlement can apply to all supplies, or be limited to key items such as facades or windows;
- given the risk profile of a contractor seeking to recover its costs of such delay, one option is to agree to share the cost impact;
- requiring a contractor to demonstrate it has allowed a buffer or contingency in its program for key supply items. To the extent this can be done, any entitlement to recover time should not be triggered until the buffer has been exhausted;
- requiring a contractor to price the risk of this delay up front, and then fixing that cost. This will likely result in an overall increased cost but may provide some commercial certainty (although it will of course not eliminate delays);
- seeking to manage the risk of delivery delay by requiring a contractor to pay deposits for, or purchase, off-shore supply items earlier than usual. The risk to the principal can be managed in the usual way by the provision of bank guarantees against the advance payment and requiring the item to be secured and stored safely;[8]
- requiring a contractor to source more items locally, if possible, noting the current domestic supply chain challenges as a result of lockdowns in several states; and
- build in a process to 'value manage' the key materials or items post contract to explore current delays and identify whether substitutions can or should be made.

For those who draft contracts, it is necessary to consider:

- how supply chain delay is framed. For example, what proof needs to be provided by a contractor, or is there another benchmark which could be used;[9]
- whether the supply chain delay will be subject to a geographic constraint (for example, China) or limited to key items (such as facades or joinery); and
- how changes in law are framed, noting that most contracts do not allow for changes in law made by agencies or governments outside Australia.

To a large extent the impacts we are seeing cannot be eliminated by either party. Whether this is a long-term shift is yet to be seen but supply chain shortages obviously cannot be ignored today, nor for the foreseeable future.

8 We understand some contractors are taking on additional warehousing facilities and storage areas to manage the additional items they are likely to have to store for longer periods.

9 For example by reference to controls imposed under the Cth Biosecurity Act 2015. In the case of off shore delays, consideration would need to be given to granting relief for shut down of manufacturing sites, or just ports.

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Best Lawyers Peer Review, 2015–2020

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

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

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

## Michael Leong

Partner, Environment & Planning and Real Estate

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

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

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

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

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

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

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

## Nick Le Mare

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Employment & Labour and PNG

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

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

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

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

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

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

## Daryl Clifford

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Projects and Real Estate

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

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

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

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

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

## Anna White

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+61 408 872 432
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**"Professional, attentive, responsive and considers the bigger picture"**
General Counsel Australasia, manufacturing client

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

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

## Peter Schenk

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Projects

+61 7 3228 9869
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**Leading Lawyer – Infrastructure Australia**
Chambers Asia Pacific, 2020

**Pre-eminent Lawyer** Doyles Guide, 2019

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

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

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

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

## Rhys Lloyd-Morgan

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Projects and Real Estate

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+61 411 116 082
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**"We use Corrs for much of our work because of our confidence in Rhys. We regularly recommend Corrs for the same reason."**
Property Industry Client, 2020

## Melanie Bond

Partner, Projects and Commercial Litigation

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+61 458 033 622
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## Melbourne

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+61 417 154 612
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**Best Lawyer – Water** Best Lawyers Peer Review, 2014 - 2020

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

**Leading Construction Lawyer Victoria** Doyles, 2013-2015, 2017

### Ben Davidson
Partner, Projects and Commercial Litigation

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

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

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

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

### Andrew Stephenson
Partner
Projects and Arbitration

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

**Leading Lawyer : Construction – Australia** Chambers Asia Pacific, 2020

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

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

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

### Brad Robinson
Partner
Projects

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

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

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

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

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

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

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

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

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

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

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

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

+61 3 9672 3218
+61 423 026 218
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**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
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Projects

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

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

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

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

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

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

## Jared Heath

Partner, Projects and Commercial Litigation

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

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

Best Lawyer – Government Practice
Best Lawyers in Australia 2020

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

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

## Chris Horsfall

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Projects and Arbitration

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

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

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

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

## Nathaniel Popelianski

Partner
Property & Real Estate

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

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

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

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

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

## Nastasja Suhadolnik

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## David Ellenby

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Property & Real Estate

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+61 401 030 979
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"The commercial and prompt approach all round certainly contributed to a speedy and positive result, which we appreciated"
Senior Legal Counsel, multinational developer

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

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

## John Walter

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

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

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

## Paul Brickley

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Projects

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

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

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

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

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

## Anthony Arrow

Partner
Projects

+61 3 9672 3514
+61 421 114 010
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Recognised Practitioner – Construction
Chambers Asia Pacific, 2020

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

Leading Lawyer: Infrastructure – Australia
Chambers Asia Pacific, 2020

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

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

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


### Michael Earwaker
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+61 2 9210 6309
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michael.earwaker@corrs.com.au


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

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

Construction – 2019
Who's Who Legal, 2019


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

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


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

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

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

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


### Christine Covington
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+61 419 607 812
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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
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+61 2 9210 6621
+61 412 836 021
louise.camenzuli@corrs.com.au


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

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

Leading Lawyer – Environment
Chambers Asia Pacific Guide, 2018

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


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


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

Leading Leasing Lawyers – NSW 2019
Doyles Guide, 2019

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

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

## Jack de Flamingh

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

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

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

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

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

## Trevor Thomas

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

## Peter Calov

Partner,
Projects; Property & Real Estate

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+61 412 397 660
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"He is outstandingly knowledgeable and his team is bright ... He is calm and gets things done in a timely manner with a can-do attitude."
Chambers Asia Pacific Guide

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

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

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

## Carla Mills

Partner
Projects and Arbitration

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

**Rising Star**
Doyles Construction & Infrastructure – Australia, 2020

## Andrew Leadston

Partner
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+61 2 9210 6114
+61 403 862 799
andrew.leadston@corrs.com.au

**Best Lawyer - Real Property – Sydney**
Best Lawyers Peer Review, 2015-2021

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

# Contacts

## Perth


### Spencer Flay
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Projects and Arbitration

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


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

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

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

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


### Chris Ryder
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+61 412 555 388
chris.ryder@corrs.com.au


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


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

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

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

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


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

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

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

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


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

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

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## Papua New Guinea


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

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

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

Best Lawyers – Corporate Law
Best Lawyers 2020

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

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

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

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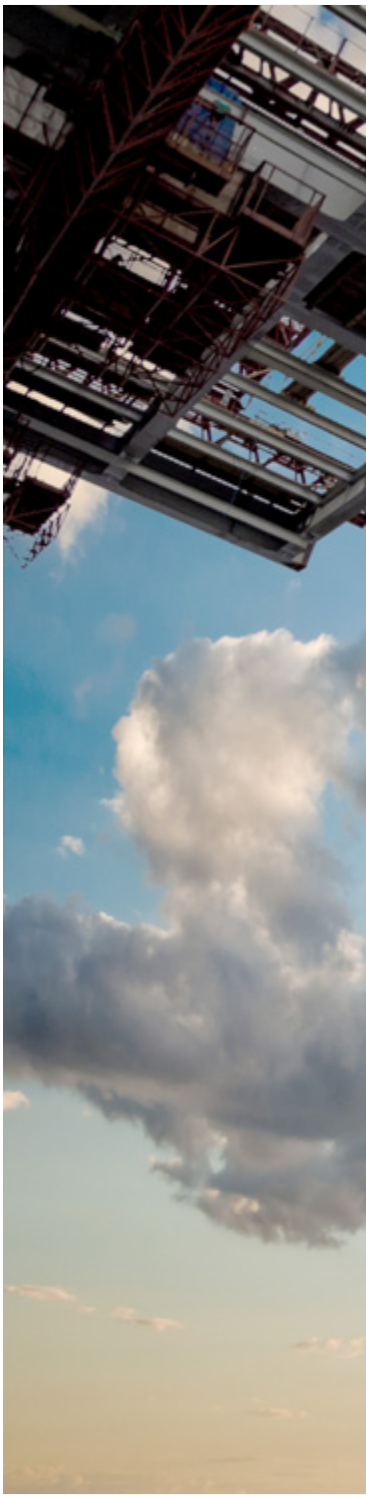

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