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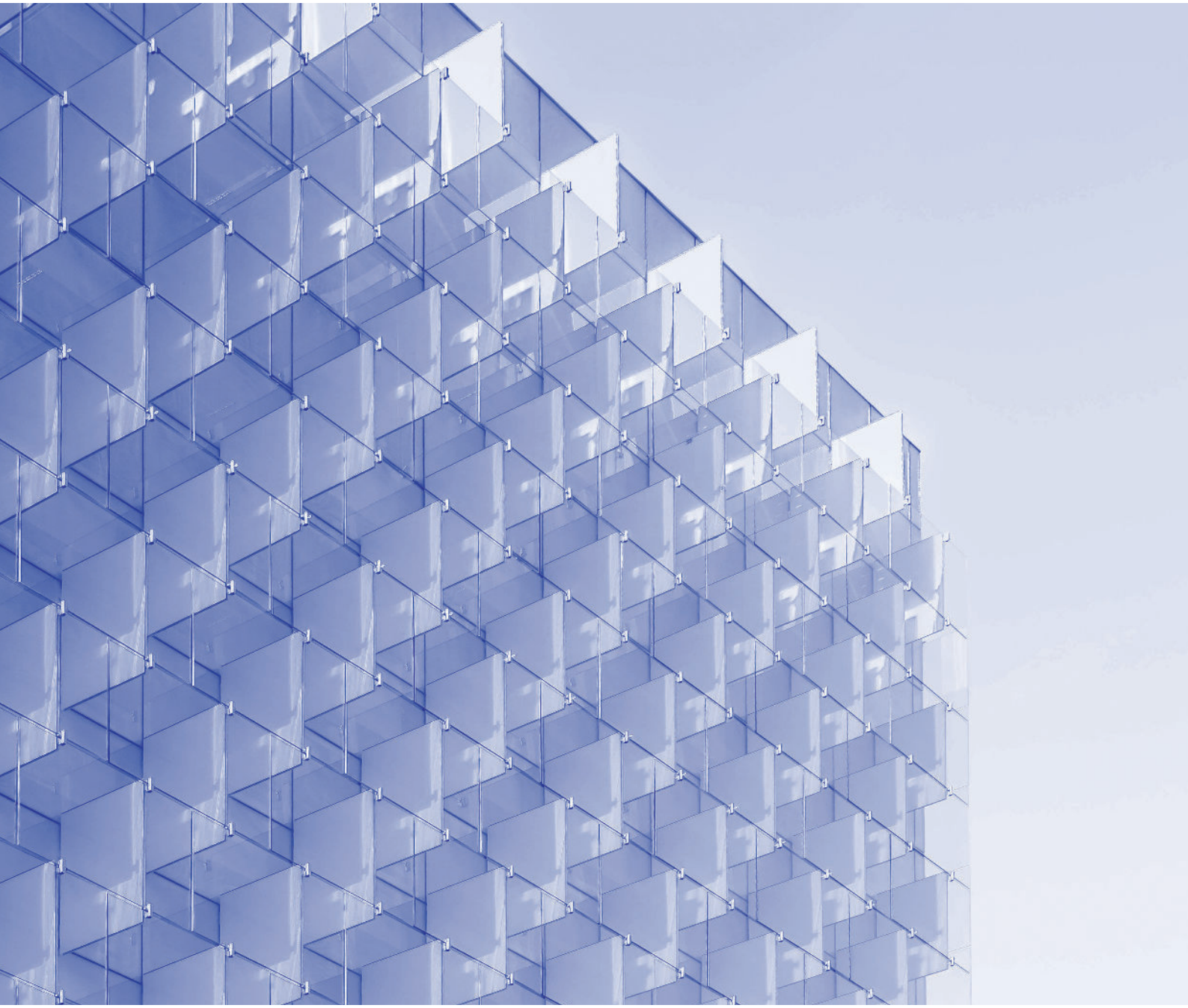

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The ACLN acknowledges the Australian Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which our company is located and where we conduct our business. We pay our respects to ancestors and Elders, past, present and emerging.

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Contributions to the ACLN from readers are encouraged. Please submit articles for consideration to the publishers.

EDITORIAL

Myra Nikolich

Professor Doug Jones AO RFD and Robert Turnbull argue that the preparation of witness statements in international commercial arbitration should be reformed. In current practice, they have become a vehicle for the making of legal submissions, quoting from and commenting on documents, and speculating on all manner of things; essentially impeding arbitral efficiency and driving up costs. The authors propose some measured changes which are aimed at increasing arbitral efficiency, reducing costs, and allowing everyone involved to focus on the real factual issues in dispute. A draft procedural order is conveniently appended to this paper, to assist arbitrators and counsel to start immediately on the path of making witness statements focus on the real issues in dispute and to serve arbitral efficiency.

Kym Fraser, Kyla Cameron and Jasper Choi discuss *Sully v Englisch* [2022] VSCA 184, a case that shows the perils of failing to document an oral agreement at mediation. The case is a reminder for both mediators and parties engaging in mediation to ensure that any agreement reached is reduced to writing and signed by the parties on the day, even though an oral agreement can be objectively determined to be immediately binding and enforceable.

Jack Miller considers how increasingly uncommon it is for negotiations to be conducted by an individual representing each party, they are negotiated by teams. In the context of negotiating a construction contract, most negotiations will concern teams consisting of parties' own legal, commercial, project management and technical representatives. The author provides analysis of how well team negotiating is represented in what is commonly considered the most comprehensive source of literature on the topic of negotiation. The author points out that much of enabling conducive negotiations is down to sufficient planning and preparation, something which most topics on negotiating fail to address in the context of teams. Planning and preparation is key to the success of any construction project and larger teams are often required to ensure project complexity is adequately considered and addressed during negotiations.

Lisa Meyer discusses how changes made to the *Corporations Act 2001* (Cth) earlier this year make it easier for businesses to enter into contracts electronically. The author highlights two main changes that were made to the process of document execution when the Act was updated, which have simplified the signing process and provided companies with additional methods for executing documents.

Leighton Moon and Fin Neaves consider when a contractor is entitled to time and/or costs due to COVID–19 restrictions under standard form documents. Following the wider reopening of the construction industry in Melbourne, they suggest that it may be an appropriate time for many principals and contractors to revisit their construction contracts to understand their rights and obligations with respect to extension of time and delay damages. The authors review the relevant clauses set out in unamended AS 4000/AS 4902 and AS 2124/AS 4300 contracts, noting that it is common for parties to amend these standard form documents, and that these amendments may affect their respective rights and obligations in relation to COVID–19 issues.

Brent Turnbull discusses *Look Design and Development Pty Ltd v Edge Developments Pty Ltd & Flaton* [2022] QDC 116, a case that concerned a claim for damages for breach of copyright which the plaintiff claimed subsisted in its plans and drawings of a residential home. At issue was whether copyright subsisted in the plans, whether the production of subsequent plans and a house built in accordance with them amounted to an infringement of copyright, and whether the plaintiff was entitled to damages for loss of opportunity and additional damages under the *Copyright Act 1968* (Cth).

Lina Fischer and Danielle Mizrahi report on the New South Wales Government's reform agenda for building standards. As the authors note, the reform process for New South Wales building legislation has taken another step, with the recent release of the government's response to the Public Accountability Committee's report from the 'Further Inquiry into the Regulation of Building Standards'. The authors highlight some of the key government responses to the Committees' recommendations.

Tom Grace discusses *Rialto Sports Pty Limited v Cancer Care Associates Pty Limited; CCA Estates Pty Limited; Davjul Holdings Pty Limited; Armmam Pty Limited* [2022] NSWCA 146, a decision that focuses attention on the terms of the sale contract when developers sell units 'off the

plan'. The case is a reminder that developers and purchasers should consider the terms of their sale and purchase contracts.

Kyle Siebel and Nicola Voss look at *Argyle Building Services Pty Ltd v Dalanex Pty Ltd (No 2)* VSC 452, a case in which the court dismissed rigorous legal analysis and excessive formality for security of payment adjudications. The case shows that given that adjudication determinations are often made by adjudicators who are not legally trained, requiring a legal analysis at every point of an adjudication would cause too great a burden and would be inconsistent with the purposes of security of payment legislation.

Nick Rudge, Kip Fitzsimon, Michael Hogan and Joseph O'Shea have identified three key ways to avoid costly contract disputes, many of which are foreseeable. As the authors note, because contractors are struggling with competitive pressures, resourcing problems and supply chain constraints, they face significant pressure during negotiations to remain competitive. Tenders may be awarded for an unrealistic price because of insufficient budget allocation, or price pressure and competition during procurement. Against this backdrop, the authors suggest how parties entering into project contracts could address these concerns to ensure they keep contract delivery teams focused on delivery, not disputes.

Robert Riddell discusses the application of issue estoppel in the context of adjudications under the *Building and Construction Industry Security of Payment Act 1999* (NSW). He notes that although the statute has not changed in any material respect, it has been overshowed, and some might say overwhelmed by 'judicial guidance'. The author considers a number of these cases.

Kirsty Smith and Andrea Wilson discuss the importance of dealing with defects soon after they are discovered, when to engage an expert, and how to maintain privilege over communications with the chosen expert. As the authors point out, engaging the right expert is essential, as is ensuring your position is not compromised throughout the expert process.

Owen Cooper, Phoebe Roberts and Eliza Kane discuss climate–aligned contracting for infrastructure and construction, as contracts may be the key to how an organisation takes demonstrable steps to deliver to net zero commitments. As the authors highlight, organisations globally are embedding climate solutions into commercial arrangements and using contractual drafting to deliver on their commitments.

Michael Hogan and Jonathan Harrison note that in 2022 Australian contractors firmly rejected the traditional approach to input cost risk allocation. Over the last couple of decades, major infrastructure projects have not typically contained 'rise and fall' mechanisms; rather contractors have borne the risk that their price will make sufficient allowance for escalation of input costs during delivery of the project. However, this approach is changing, and the authors discuss the issues that are likely to be relevant to both clients and contractors in reaching a mutually acceptable risk allocation regarding input costs.

Sam Kingston and Christian Mennilli discuss *In the matter of Nicolas Critini Pty Ltd (in liq)* [2022] NSWSC 1149, a case in which the court considered an important question regarding the intersection of the *Corporations Act 2001* (Cth) and the *Building and Construction Industry Security of Payment Act 1999* (NSW) for proofs of debt in a liquidation.

Sophia Bleakley discusses *Onslow v Cullen* [2022] NSWSC 1257, a case in which the court considered the applicable limitation period where defective residential building works amount to both a breach of contract and a breach of the statutory warranties. The decision has important consequences for owners bringing a claim for breach of the statutory warranties, particularly in respect of non–major defects.

Chris Cranstoun and James Hadjiantoniou discuss *Hacer Group Pty Ltd v Euro Façade Tech Export SDN BHD* [2022] VSC 373, in which the court found that failure to comply with the provisions governing notification and rectification of defects did not preclude a party from relying on its common law rights to recover costs arising from rectification works. The decision serves as a reminder to parties when negotiating contractual indemnities to carefully consider how those indemnities will operate in relation to contractual regimes in the event of a breach of contract.

Leighton Moon, Tara Nelson and Kai–Yang Goh discuss domestic building disputes and delays at the Victorian Civil and Administrative Tribunal (VCAT). In *Uber Builders and Developers Pty Ltd v MIFA Pty Ltd* [2021] VCC 1677, the County Court reiterated that the present pandemic–induced delays in VCAT have become so severe that VCAT could be bypassed in the current circumstances. The authors remind us that until otherwise overruled by a superior court there is now a strong precedent that parties to domestic building disputes may commence proceedings in courts rather than in VCAT while conditions persist.

MEMORIALS AND WITNESS STATEMENTS—THE NEED FOR REFORM

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INTRODUCTION

Witness statements are a core feature of international commercial arbitral practice. They are not going away any time soon. Over the last few decades, witness statements have moved from a place on the periphery of international arbitral practice—principally used by common law practitioners informed by their own domestic court procedure—to become an indispensable arrow in the quiver of documents used by parties and their legal representatives to win their cases. Or are they indispensable?

More recent practice suggests that, in their current form, they might not be. Witness statements have been transmogrified from a short and curt recitation of a factual witness' memory of the events the subject of an arbitration, into a vehicle for the making of legal submissions, commenting on documents (even documents the witness had never seen before the arbitral proceedings commenced) and speculating on all manner of things, including the conduct of other parties.

In order to promote arbitral efficiency, reduce costs, and enable the tribunal and parties to focus on the real issues in dispute, this trend needs to be addressed. Witness statements should return to something closer to their original purpose, namely giving the tribunal an account of what the particular witness heard, saw or thought at the time of the events the subject of the arbitration.

In this effort, international arbitration practitioners have something to learn from commercial litigation, in particular reforms to witness statement procedure recently introduced in the Business and Property Courts of England and Wales.[1] Those reforms seek to streamline the content and purpose of witness statements, so that they give the judge what is needed—no more and no less—to decide the factual issues in dispute. While we do not propose that everything being done in England be adopted as part of international arbitral practice, we propose some measured changes which are aimed at increasing arbitral efficiency, reducing costs, and allowing everyone involved to focus on the real factual issues in dispute. These are set out in a proposed procedural order appearing as an Appendix to this paper.

In parallel, we propose that changes to the practice of preparing witness statements occur in the wider context of a broader move towards the memorial approach to the presentation of cases. By taking reformed witness statements and a greater adoption of memorials hand in hand, arbitration practitioners can save their clients costs, spend less time preparing cases, and present their cases more convincingly to tribunals.

WHAT IS A WITNESS STATEMENT?

The question, 'What is a witness statement?' might be considered normative. Indeed, the arguments contained in this article might be cited as proof that there is no fixed content to the definition of 'witness statement'. Nevertheless, for the purposes of this paper it is useful to venture a definition.

Before doing so, it is necessary to define a 'witness'. A witness is a person who gives evidence to an arbitral tribunal to assist the tribunal in finding facts necessary to render an award to dispose of the controversy before it. Conceivably, any person may be a witness,[2] although witnesses are usually drawn from employees or directors of the parties. Typically, a distinction is drawn between witnesses of fact and expert witnesses.

In the common law tradition, this distinction depends on the rule against opinion evidence, namely that evidence of an opinion is not admissible, unless it is given by someone qualified by experience or training to give that opinion.[3] Such a person is referred to as an expert witness.

Lay witnesses, on the other hand, classically give evidence about what they have perceived, whether by sight, hearing, or touch. A lay witness' evidence may go beyond this, to describe events or circumstances based on what they have been told by others. For example, a chief financial officer might give evidence about the pattern of share ownership of a company, based on information provided to her by the company's registrar (which may be a third party). The balance of this article is concerned with lay witnesses (hereinafter, 'witness').

A witness statement is the document through which a witness gives his or her evidence–in–chief about the factual issues in dispute in an arbitration. The witness statement should include some promise (whether an oath or similar) by the witness that the evidence is true.

Depending on the procedure adopted in an arbitration, the party which did not call the witness may cross–examine the witness. That cross–examination need not be confined to the matters set out in the witness statement; other issues in the arbitration which are not addressed in the witness statement may be the subject of questions to the witness during cross–examination. If cross–examination occurs, the party calling the witness may re–examine the witness.

However, in some cases, cross–examination will not occur, and the whole evidence of that witness will be contained in the witness statement together with any responsive witness statement—no more and no less.

ORIGINS OF WITNESS STATEMENTS

It used to be the case that a witness in international arbitration would give evidence orally. Initially the party calling the witness would conduct examination–in–chief, followed by cross–examination and then re–examination. In those cases, witness statements had no role to play.

This followed litigation practice. To take a domestic example, the default position in England before 1995 was that that a witness of fact would give all of his or her evidence orally at trial.[4] The same presumption applied in New South Wales before 2001.[5] In 1992 in England, witness outlines had to be exchanged before trial, and were to contain a precis of the oral evidence which a witness would give during evidence–in–chief. In 1995, it became mandatory to exchange witness statements before trial, and they stood as the witness' only evidence–in–chief.[6]

However, that was only if witness evidence was permitted at all. There had been a general reluctance—particularly on the part of civilian practitioners—to allow witness evidence in international arbitration, on the basis that the contemporaneous documentary record provided much better evidence of what occurred than any witness testimony (whether oral or written), and so an arbitral tribunal ought to base its award on the documentary record as much as possible.[7] On this basis, some international arbitral practice tended to exclude witness evidence altogether.[8]

This general reluctance no doubt had its origins in civilian domestic court practice. While recognising the dangers of generalisation, in contradistinction to the common law tradition's preference for oral evidence going back to the 12th century,[9] the civilian approach has been to decide commercial disputes based on the documents available to the parties and presented to the court, with very little, if any, witness evidence (whether oral or written). This was attended by considerable doubt about the value of evidence from witnesses who were employees of a party to a dispute.

WITNESS STATEMENTS IN ARBITRATION TODAY

Whatever the origins of those varying approaches, arbitral practice long ago became unmoored from the practice of domestic court litigation, and has developed a procedure of its own, albeit one which varies from case to case, and can change depending on the rules adopted, the institution (if any) administering the arbitration, the agreement of the parties, the arbitrators, and local law, amongst other matters.

As part of the development of a lingua franca of international arbitral procedure, witness evidence and therefore witness statements have become the norm in commercial arbitration. It is a rare case whether neither makes an appearance. The use of witness statements is well recognised in both arbitral rules,[10] and the soft–law guidelines which inform much of international arbitration practice.[11]

WITNESS STATEMENTS—BENEFITS

If witness evidence is to be used at all, then witness statements are intended to serve a number of important purposes which seek to achieve arbitral efficiency and reduce delays and costs.

First, they are intended to reduce the length of a hearing by avoiding oral examination in chief.[12] This can be particularly time–consuming because evidence–

in–chief is generally led by non leading (i.e. open) questions. Witness statements reduce costs for the parties by shortening the amount of time spent at a hearing. It assists the tribunal in preparing the award, by setting out the evidence–in–chief in a coherent narrative, rather than having to rely on a transcript which may contain questioning, the structure and content of which is not always easy to follow. It also avoids debate, and objection, about leading questions in examination–in–chief.

Secondly, it gives the parties fair and advance notice of the evidence which the other side intends to rely on at the hearing, and in making its submissions to the tribunal. This often means that the written submissions in memorials, or made immediately before the hearing commences (often called 'opening submissions'), can take account of that evidence, which means that the parties' arguments are more focussed, and useful for the tribunal in preparing for the hearing.[13]

Thirdly, witness statements give the principal actors from the parties a means by which they can set out—in their own words—their view of the story to date and the matters which are the subject of the dispute.

Fourthly, it may encourage settlement of the dispute before the hearing, because the parties will have a better understanding of the evidence to be deployed against them. This can happen in at least two ways. The legal representatives will assess the witness statements to determine the effect they have on their respective prospects of success, and advise their clients accordingly. From the parties' point of view, it gives the principal actors an insight (which perhaps they did not have before) into how their opponents view the case and their drivers in carrying on the dispute. Those fresh perspectives—legal and personal—may incline the parties towards a settlement which might not otherwise have been possible. We do not wish to overstate the ability of witness statements to achieve a settlement where one could not be reached before; but it remains the case that there are at least some cases where they will achieve this end.

Fifthly, they allow cross–examination to be more focussed because the cross–examiner can prepare more specifically, knowing in advance what the evidence–in–chief will be, thereby being able to focus on the key points for questioning. This means that the real issues necessary for the client to prove are the subject of cross–examination.[14]

WITNESS STATEMENTS—DRAWBACKS

While witness statements seek to serve these important objectives, they have taken on some features which make them less useful than they ought to be for the witness, the parties, counsel and the tribunal. In setting out these lamentable features, it should be noted that this article does not engage with the issue of the reliability, or otherwise, of human memory and the relative utility of witness evidence more generally from that perspective, which has been covered elsewhere.[15] Nor does it engage with the issue of witness preparation or proofing, which occurs at varying degrees of intensity and intervention, usually depending on the legal tradition from which the lawyers hail. The extent to which witnesses should be prepared or coached to give evidence is beyond the scope of this paper, but is an important topic in its own right.[16]

In the hands of counsel, witness statements have been transmogrified from a written account of the evidence which a witness would give in his or her own words under oral questioning before a tribunal, to an unhappy amalgam of legal submission, documentary commentary and quotation, and speculation, with some direct experiential evidence included (but not always).[17] A prototypical witness statement in a contemporary international arbitration bears little resemblance to what a witness would actually say before the tribunal if giving evidence, despite this being their intended (and sole) purpose.[18]

In this form, witness statements are vehicles for lawyers to make legal submissions even though they have ample opportunity to do that through:

(i) pleadings;

(ii) written submissions; and

(iii) oral argument before the tribunal.[19]

The problems with this transmogrification are several fold.

First, and most problematically, witness statements cease to bear much resemblance to the witness' own words. They have become a creature of lawyers' minds, as they try to craft the evidence to fit the case they seek to advance for their clients, rather than providing the tribunal with facts they can use to resolve the dispute.[20]

This has the consequence that witness statements become less useful because the tribunal places less weight on them, knowing they are heavily crafted by lawyers, rather than representing the witness' own evidence in their own words.[21] So, a great deal of effort, time and expense is devoted to creating documents which ultimately are of diminished utility to the tribunal and the parties. Indeed, in this form, witness statement may actively harm the party's case because so little weight is placed on them that

ultimately the party has little, if any, witness evidence of substance telling the party's story before the tribunal.

Secondly, the propensity to quote from, and comment upon, contemporaneous documents does very little to advance a party's case. Documents generally speak for themselves, such that witness commentary on them is unlikely to assist the tribunal in understanding what the documents say. The tribunal can, as well as any witness or lawyer, read and interpret the contemporaneous documents. Doubtless, a party's legal representatives can be expected to be able to advance the interpretation of a document most favourable to that party via oral and written submissions. It is not common, but is sometimes the case, that a witness' commentary on those documents—whether in the words of the lawyer or of the witness—is going to lend further weight to the party's preferred interpretation of a document.

Thirdly, the difficulties outlined above are compounded when a witness comments on a document which they saw for the first time when it was shown to them in preparing their witnesses statement, some months or years after the arbitration commenced, and certainly well after the date the document came into existence. The commentary of a witness on an email which they never received, or a document which they did not see before the dispute arose, is unlikely to have any probative value—let alone relevance—in helping the tribunal or the parties understand what the document means or in resolving any dispute about the effect of the document.[22]

Fourthly, witness statements have become another vehicle for legal submission.[23] Arbitral procedure contains existing, and sufficient, opportunities for legal representatives to advance legal submissions. Depending on the procedure adopted, these include pleadings, opening written submissions, oral submissions at the beginning, during and at the end of a hearing, and post hearing written submissions. It is hardly necessary to make those same submissions by putting words into a lay witness' mouth,[24] thereby showing the tribunal that the witness clearly did not prepare their own statement, introducing unnecessary wasted time and costs, and, most importantly, diminishing the value and credibility of the witness' evidence overall.

These deficiencies—largely the fault of lawyers—have not only rendered the witness statement a document of limited utility in deciding international commercial disputes. They have actively hampered the arbitral process, and inhibited the efficient disposition of cases submitted to tribunals. That is because they are another document which needs to be drafted, read and digested by lawyers on all sides, and responses prepared, with all of it to be considered by the tribunal.

The tribunal then has to spend time assessing the witness' evidence, and dealing with it in the award. All of this introduces significant and unnecessary wastage of time and cost, making the arbitral process slower and more expensive than it needs to be.

But there is another way. Witness statements can be prepared so that they serve, rather than hinder, the resolution of arbitral disputes.

PROPER PURPOSES OF WITNESS STATEMENTS

In contrast to what they have become, witness statements should return to their roots, namely as the evidence–in–chief a witness would give, in the witness' own words.[25] With this in mind, we

Over the last few decades, witness statements have moved from a place on the periphery of international arbitral practice ... to become an indispensable arrow in the quiver of documents used by parties and their legal representatives to win their cases. Or are they indispensable?

suggest that witness statements have four principal purposes in international arbitration.

First, a witness statement should be an account of the witness' recollection of events, as the witness remembers them. As much as possible, they should be written in the witness' own words, acknowledging that lawyers will assist in the preparation of the statement.

Second, as a whole, the witness statements should fill the gaps in the factual evidence left by the documents. In modern disputes, much of the evidence will be documentary, and that documentary evidence will cover a significant number of the facts in dispute. This itself can become a burden, because of the volume of documentary evidence. But it is often the case that the facts in issue will need to be the subject of witness evidence. That may be because additional commentary is required, to supplement what a document says because the document does not convey the whole story. It may be because there is no document addressing a particular issue, so witness evidence is needed to resolve that issue. It may be because part of the case revolves around a conversation which was not the subject of documentary record. It may be because an issue in dispute is a person's state of mind or understanding of certain subject matter. For example, in a claim alleging loss based on a misrepresentation, the way in which a representation was understood by the representee may be relevant to determine whether the representation conveyed the meaning alleged, and whether that representation was misleading or not. That will often require the witness evidence of both the representor and representee to resolve the issue in dispute, along with other relevant evidence. In short, witness statements should contain what a witness perceived, no more, no less.

Third, a witness statement can be a useful vehicle for a party to tell their side of the story. A party will often choose a relatively senior employee or director to give an account to the tribunal of how that party sees the circumstances which are the subject matter of the dispute, and what went wrong to cause the parties to be in an arbitration. This will help set the scene for the tribunal, and understand why the parties think they have ended up in a dispute. This purpose should not, however, be taken too far. A witness statement of this type should not become a vehicle to repeat legal submissions, or craft the story in the way the lawyers think it would be best presented. Rather, as much as possible, it should represent the witness' own words so that the witness can explain—on behalf of the party—their view of the factual background and the resulting dispute.

Fourth, witness statements from lay witnesses can provide an important foundation for expert witnesses to form their opinions and prepare their reports. Without an understanding of the factual background as understood by each party's witnesses, the experts can experience difficulty in providing an opinion which actually assists the tribunal to resolve a dispute. Without the factual foundations, their opinions may be so general or unspecific as to be unhelpful. Say there is a dispute as to whether the sum to refurbish an office amounts to a contingent liability. The dispute turns on when the liability will need to be incurred. The tenant might say that, in its long experience of renting offices for its business, offices need to be refurbished every five years. The landlord might say that, in its long experience of owning and leasing offices, a refurbishment is indeed needed every five years, but that in this particular case, because the previous refurbishment was done to such a high standard, and with additional cost being incurred, it will last for eight years without a refurbishment. An accountancy expert asked to opine on whether there is a contingent liability for refurbishment will need to know, *inter alia*, the timeframe for refurbishment. Without that knowledge, any opinion the accountant gives risks being so general as to be meaningless, whereas if he is aware of the competing timelines put forward by the parties' lay witnesses, he will have a surer grounding on which to provide an opinion.

We suggest that those are the four principal purposes of witness statements. Now we return to the practical steps needed to achieve them.

PROPOSED CHANGES—MEMORIAL APPROACH

The vices which afflict the modern witness statement cannot be addressed by reforming this document on its own. A wider approach to procedure needs to be embraced. The problems identified with witness statements above are:

(i) over lawyering;

(ii) extensive commentary and quotation from documents;

(iii) legal submissions; and

(iv) speculation.

These problems can be addressed by adopting a memorial approach, rather than the more traditional common law pleading approach.

Broadly, there are two principal approaches to the preparation of material for a final hearing in international arbitration: the memorial approach and the pleading approach.[26] These are

not so much polar opposites as points on a spectrum. The flexibility of international arbitration allows the tribunal and parties to craft a procedure somewhere along the spectrum which best serves to resolve the specific dispute between them efficiently and justly. Whether that flexibility is suitably employed, or employed at all, is another challenge.

Stated generally, the memorial approach arises from the civil law tradition where all documentary evidence, witness evidence and legal submissions are presented to the tribunal and opponents in one submission. The pleading approach derives from the common law tradition[27] where the parties set out their factual position in written pleadings, followed sequentially by discovery/disclosure, witness statements, expert reports (if any), and finally written opening submissions or skeleton arguments before the oral hearing.

This article does not seek to debate the merits and demerits of either a pleading or a memorial approach; that debate has been addressed elsewhere.[28] However we do contend that a memorial approach will often assist parties in achieving efficiency in the presentation of their cases and will assist the arbitral tribunal in reviewing the documentary record in preparation for a hearing, as compared with the pleadings approach.[29] Consequently a memorial approach will make witness statements more useful to the tribunal.

We would suggest that tribunals and parties adopt an approach closer to a memorial approach where the parties are required to exchange simultaneously, or sequentially, memorials containing: lay witness statements; documents on which they rely; and any legal submissions. Those legal submissions may come close to a common law pleading in that they will set out the factual and legal matters that the party alleges in the dispute but go further by advancing legal argument by reference to cases and other legal authorities and the facts as drawn from the documents and witness statements. This should be followed by the exchanges of responsive memorials, containing the same types of documents. Whether it is necessary to have a further reply round of memorials will largely be governed by the nature of the dispute, however such a third round can often be avoided.

It is also helpful to include in a memorial a chronology (which can be cross–referenced to contemporaneous documents) and a *dramatis personae*. Ideally, the parties should co–operate to produce a consolidated single version of each of these documents, pointing out, if necessary, where there are any points of divergence between them. If these documents are kept purely factual—and not seen as yet another vehicle for the parties to argue their respective cases—they can assist the tribunal and parties to understand the factual matrix of the dispute.

It is possible to incorporate at some point in this process a procedure for document disclosure where the parties identify documents relevant to the dispute (whether helpful or adverse to their case) and disclose those to the other parties. Documents which are disclosed need not necessarily form part of a memorial or the documentary record which goes before the tribunal; it will be up to the parties to deploy disclosed documents in support of their case.

The obvious omission from the memorials is expert evidence. Given that the factual substrata need to be broadly stated before experts are able to give an opinion to assist the tribunal in resolving the dispute, we suggest that in most cases expert evidence be deferred until after the at least the first exchange of memorials so that the experts know the factual matters in issue and are able to provide an opinion which assists the tribunal.

The principal advantage of a memorial approach is that each of the witness statements and the legal submissions can make cross–references to the contemporaneous documents on which the parties rely. In this way it is possible to avoid witnesses quoting from the contemporaneous documentary record, thereby allowing the tribunal to review the relevant documents in the round, rather than on a selective basis as chosen by the witnesses (or the parties' lawyers).

Modern software allowing hyperlinking between electronic documents, and indeed, individual paragraphs or sections of documents, has made such a cross–referencing exercise much easier (and more useful) than it formerly was. It also makes it easier for the parties and the tribunal to navigate around the documents by clicking through the hyperlinks.

If our proposal of the memorial approach is adopted, it will avoid the problem of witness statements containing extensive quotation from, and commentary on, the contemporaneous document records. Such commentary can be made in the legal submissions which the parties submit at the same time as the witness statements. It will also cause the parties to deprecate the approach of repeating their legal submissions in the witness statements because both documents will be submitted to the tribunal and to the other side at the same time.[30]

... a memorial approach will often assist parties in achieving efficiency in the presentation of their cases and will assist the arbitral tribunal in reviewing the documentary record in preparation for a hearing, as compared with the pleadings approach. Consequently a memorial approach will make witness statements more useful to the tribunal.

A memorial approach also has the advantage of forcing the parties to focus on their case at an early stage and the issues which are in dispute. The risk with a pleading approach is that the parties advance factual cases, without having carried out a thorough review of the documents or obtaining proofs of evidence from witnesses. Therefore, the case as stated in the pleadings risks being modified to suit the contemporaneous documents once reviewed, or the witness statements, once prepared. It will also force the parties to make their case based on their own contemporaneous documents they hold, rather than holding out hope that their case can be advanced through the disclosure of documents held by the other side.

One potential downside of a memorial approach is the possibility that a witness statement will engage with matters of fact which are not contested. With a memorial approach, the factual issues in dispute are not clear until the respondent files its first memorial. Therefore, the claimant's witnesses are at risk of preparing long statements to support allegations made in the legal submissions, only to find that some of those allegations are accepted by the respondent, rendering the claimant's witness statements unnecessarily long. In our view, that risk is tempered by the fact that if our proposals for the reform of witness statements are adopted, the claimant will rely on the contemporaneous documents to prove factual issues, rather than through witness statements.

A PROPOSED SOLUTION

Drawing on some of the reforms implemented in the Business and Property Courts in England, we propose that limits and guidelines be imposed on the preparation of witness statements.

Not all of the English proposals should be adopted; some are cumbersome, and of themselves introduce unnecessary cost and time in the preparation of witness evidence. It is not, however, the purpose of this note to critique the approach the judiciary has taken in England and Wales towards the laudable objective of confining witness statements to their proper purpose. Rather, in line with the English changes, we propose the following principles be applied in the preparation of witness statements, and be reflected in procedural orders:

(i) subject to providing background context, the witness statement must only contain matters relevant to the issues in dispute of which the witness has personal knowledge;

(ii) the witness statement must not contain any supposition, speculation, conjecture, or commentary on another person's knowledge;

(iii) the witness statement must not contain argument;

(iv) there should not be a recitation of the documentary record, or quotations from contemporaneous documents;

(v) witnesses should only refer to documents which they received or were aware of before the dispute arose, and only if it is necessary to refer to the document; and

(vi) the witness statement should identify where documents have been used to refresh the witness' memory (whether those documents have been referred to or not in the witness statement).

By adopting both a memorial approach and the principles above, the tribunal and parties will go a long way towards reducing the unnecessary time and cost, as well as the inefficiency, presently attending the preparation of witness evidence, and presenting the case to the tribunal.

The Appendix to this paper contains a portion of a draft procedural order, which can be used in regulating the preparation of witness evidence.

CONCLUSION

Tribunals want to hear from factual witnesses. They shape the tribunal's understanding of the contours of the dispute, while helping the tribunal discharge their principal duty: delivering an enforceable, fair award deciding the dispute and doing justice between the parties. Parties want witness evidence to go before tribunals. Witnesses serve to put a human face on what are often technical or commercial disputes, as well as telling a party's story to the tribunal.

But the principal vehicle for this—the witness statement—is not serving these objectives. It has become a product of lawyers' eager drafting, seeking to advance, at every opportunity, the parties' case as the lawyers perceive it best presented. Witness statements, as commonly deployed in international commercial arbitration, do not help the tribunal, the parties, the lawyers or the witnesses themselves contribute to the resolution of a commercial dispute, which, after all, is the principal endeavour on which everyone embarks when participating in an arbitration.

Efficient dispute resolution by arbitration can be served by having witness statements return to their proper purpose. If all participants focus on preparing witness statements which tell the witness' story as they perceive it, without formulaic and artificial recitation of documents or incantation of legal arguments they are not qualified to advance, then they can help tribunals decide disputes more efficiently, and with less cost for all involved. If this is done in the context of a memorial approach so much the better, because, in that way, all of the relevant material will be put before the tribunal at the same time, in a coordinated fashion, allowing the tribunal and the parties to understand better the factual scenarios, the legal arguments, and the documentary evidence presented by each side.

APPENDIX—DRAFT PROCEDURAL ORDER DEALING WITH WITNESSES

1. Exchanges of Parties' Cases

1.1. The Claimant is to submit its Statement of Claim on [date].

1.2. The Respondent is to submit its Statement of Defence and Counterclaim on [insert date]. The Statement of Defence and Counterclaim and accompanying evidence should be responsive to the Statement of Claim.

1.3. The Claimant is to submit its Reply and Defence to Counterclaim, if any, on [insert date]. The Reply and Defence to Counterclaim and accompanying evidence should be responsive to the Statement of Defence and Counterclaim.

1.4. The Respondent is to submit its Rejoinder and Reply to Counterclaim, if any, on [insert date]. The Rejoinder and Reply to Counterclaim and accompanying evidence should be responsive to the Reply and Defence to Counterclaim.

1.5. The Claimant is to submit its Rejoinder to the Reply to Counterclaim, if any, on [insert date]. The Rejoinder to the Reply to Counterclaim and accompanying evidence should be responsive to the Rejoinder and Reply to Counterclaim.

1.6. Each of the pleadings referred to in the immediately preceding paragraphs are to be accompanied by the documents sought to be relied upon by the party submitting the pleading, legal arguments advanced by the party, factual and legal exhibits, and factual witness statements (excluding expert reports which are to be filed in accordance with Part [insert]). Those documents and factual witness statements are to comply with the provisions contained in Part [insert references to provisions addressing factual witness statements, expert reports and the general form of documents].

2. Factual Witness Statements

2.1. The Parties shall file and exchange any factual witness statements on or before [date].

2.2. The Parties shall file and exchange any responsive factual witness statements on or before [date].

2.3. The purpose of witness statements is to set out the matters of fact which a witness would give if they were called to give oral evidence at a hearing. In accordance with that purpose, each witness statement shall:

(i) commence with a summary of matters intended to be established by the witness;

(ii) be as concise as the case allows;

(iii) subject to providing background context, only contain matters relevant to the issues in dispute of which the witness has personal knowledge and should not contain any supposition, speculation, conjecture, or commentary on another person's knowledge;

(iv) not contain argument;

(v) not be a recitation of the documentary record and shall not contain quotations from documents (except where absolutely necessary);

(vi) subject to leave of the Tribunal, only refer to documents where the witness has seen the document before the commencement of the arbitration and it is necessary to refer to the document, for example to explain the witness' understanding of the meaning of a document at the time it was sent or received; and

(vii) identify where documents have been used to refresh the witness' memory (whether those documents have been referred to or not in the witness statement).

2.4. In terms of format, each witness statement shall:

(i) have attached a photograph of the witness, set out the name and business address of the witness, his or her relationship with any of the Parties, if any, and a description of his or her qualifications, including his or her competence to give evidence;

(ii) be signed and dated by the witness;

(iii) take the form of a declaration under oath or affirmation, to the effect that the contents are true;

(iv) be numbered discretely from other documents and properly identified as such. Witness statements submitted by the Claimant shall begin with the letters 'CWS' followed by the name of the witness (i.e. CWS–Picasso, CWS–Da Vinci, etc.); witness statements submitted by the Respondent shall begin with the letters 'RWS' followed by the name of the witness (i.e. RWS–Rembrandt, RWS–Rubens, etc.); and

(v) contain numbered paragraphs and page numbers.

2.5. Any person may present evidence as a witness, including a Party or a Party's officer, employee or other representative.

2.6. Factual witness testimony at the Main Evidentiary Hearing shall proceed as follows:

(i) Oral evidence at the Hearing shall be given under oath or affirmation.

(ii) There shall be an opportunity for a brief examination by the Party producing the witness, limited to confirming and if required correcting the accuracy of the contents of their written witness statement, such confirmation or correction to be provided in writing in advance.

(iii) The other Party shall have the opportunity to cross–examine the witness in the usual manner, subject to the ability of the Tribunal to direct questions to the witnesses at any time in its discretion.

(iv) The first Party may then re–examine the witness if it so wishes. Such re–examination shall be limited to matters that have arisen in the cross–examination.

(v) Under the Tribunal's authority and at its discretion, a Party may be allowed to recall a witness if the circumstances so justify.

2.7. Witness statements from witnesses not required for cross examination shall be admitted as documentary evidence, however the Tribunal will be entitled to attach such weight to such evidence as it considers appropriate.

2.8. Any witness who has filed a witness statement shall make themselves available to be cross–examined at the Main Evidentiary Hearing should notice requiring his or her cross examination be given by the other Party [date]. The Party relying on such evidence shall secure that witness' presence and availability at the Main Evidentiary Hearing in advance.

2.9. In the event that a Party does not make a witness available, the requesting Party may apply for any additional ruling from the Tribunal, including a ruling that the Tribunal disregard the content of that witness' statement(s), or the drawing of an adverse inference.

2.10. The admissibility, relevance, weight and materiality of the evidence offered by a witness shall be determined by the Tribunal with the IBA Rules on the Taking of Evidence in International Commercial Arbitration 2020 (IBA Rules) serving as a guideline.

2.11. A Party's decision not to call a witness for cross–examination will not be taken to mean that the Party does not contest the witness/expert's evidence.

2.12. The Tribunal may, at any time before this Arbitration is concluded, order any Party to provide, or to use its best efforts to provide, the appearance for testimony at a Main Evidentiary Hearing of any person including one whose testimony has not been offered.

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4. Rules of the Supreme Court 1965 (Eng), Order 38, rule 1.

5. Supreme Court Rules 1970 (NSW), Part 36, rule 2.

6. Practice Direction (Civil Litigation: Case Management) [1995] 1 WLR 262, [3]; Rules of the Supreme Court 1965 (Eng), Order 38, rules 2A(2) and 2A(7).

7. UNCITRAL, 9th session, Committee of the Whole (II), 9th Meeting, 16 April 1976 (A/CN.9/9/C.2/SR.9).

8. Pietrowski, 'Evidence in international arbitration' (2006) 22 *Arbitration International* 373, 394.

9. Traceable to the Assize of Clarendon (1166).

10. E.g. International Chamber of Commerce Rules of Arbitration 2021, article 25(5); London Court of International Arbitration Arbitration Rules 2020, article 20.3; UNCITRAL Arbitration Rules 2013, article 27(2), Singapore International Arbitration Centre Rules 2016, article 25.4.

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14. Landau QC, 'Tainted Memories: Exposing the Fallacy of Witness Evidence in International Arbitration', Kaplan Lecture, 17 November 2010, 7.

15. Landau, 13–24; International Chamber of Commerce Commission on Arbitration and ADR, The Accuracy of Fact Witness Memory in International Arbitration (2020). For recent judicial consideration of this issue, see *Mattingley v Bugeja* [2021] EWHC 3353 (Ch) at [25] ff.

16. See Landau, 9–12.

17. For similar criticism, see *Mansion Place Limited v Fox Industrial Services Limited* [2021] EWHC 2747 (TCC), [37].

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20. *Dukeries Healthcare Ltd v Bay Trust International Ltd* [2021] WTLR 809 at [133]; HM Courts and Tribunals Service, Factual Witness Evidence in Trials before the Business & Property Courts: Implementation Report of the Witness Evidence Working Group (July 2020), [10].

21. See *Exportadora De Sal SA de CV v Corretaje Maritimo Sud–Americano Inc* [2018] 1 Lloyd's Rep 399 at [24].

22. See *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296, 3304 [39].

23. Hunter 'The procedural powers of arbitrators under the English 1996 Act' (1997) 13 *Arbitration International* 345, 353.

24. See *JD Wetherspoon plc v Harris* [2013] 1 WLR 3296, 3304 [39].

25. See *Prime London Holdings 11 Ltd v Thurloe Lodge Ltd* [2022] EWHC 79 (Ch) at [9].

26. Born, 2422, §15.08 [V].

27. At least since 1875, when the *Judicature Acts 1873–1875* abolished the forms of action in England, and introduced factual pleadings: *Supreme Court of Judicature Act 1873* (36 & 37 Vict, c. 66) and *Supreme Court of Judicature Act 1875* (38 & 39 Vict, c. 77).

28. Shah and Stewart–Ornstein, 'Memorials v pleadings: How to pick the winning approach for arbitration' (2019) Practical Law Arbitration Blog; Bedey, 'Pleadings v memorials—What's the difference' (2014) Lexis Nexis Dispute Resolution Blog; ACICA Practice & Procedures Board, ACICA Explanatory Note: Memorials or Pleadings?, Australian Centre for International Commercial Arbitration (2020).

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30. As proposed in *Exportadora De Sal SA de CV v Corretaje Maritimo Sud–Americano Inc* [2018] 1 Lloyd's Rep 399 at [27].

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THE PERILS OF FAILING TO DOCUMENT AN ORAL AGREEMENT AT MEDIATION—A CAUTIONARY TALE

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INTRODUCTION

Commit any agreement made to written form on the day of the mediation, regardless of the simplicity of the agreement or quantum in dispute, or risk costly court proceedings.

Mediation is meant to be a process to avoid costly court proceedings. But what if the parties don't agree that they actually resolved their dispute in mediation? A recent case shows the dangers of not putting your agreement in writing or signing it promptly (*Sully v Englisch* [2022] VSCA 184).

A MEDIATION SETTLES THE DISPUTE—OR DOES IT?

Ms Sully obtained an order in the Victorian Civil and Administrative Tribunal against Mr Englisch for damages for misleading and deceptive conduct. As part of Mr Englisch's appeal, the parties attended a judicial mediation; a dispute then arose as to whether a binding settlement had been reached at the mediation, with Ms Sully arguing that it had and Mr Englisch that it had not. This ended up in the Victorian Court of Appeal.

The Court of Appeal noted that there was no dispute between the parties over the relevant legal principles, or that the trial judge had correctly articulated them.

These principles (as summarised at first instance and endorsed by the Court of Appeal judgment) are:

- 'Whether an agreement is reached which is intended to be immediately binding falls to be determined objectively, having regard to the presumed or inferred intention of the parties.'
- Objective intention is fact based and determined having regard to all surrounding circumstances.
- 'The ultimate question to be answered is what each party, by its words or conduct, would have led a reasonable person in the position of the other party to believe.'
- The relevant intention or belief is that obtained at the time an alleged agreement was made.
- Subjective intention or belief is not determinative but may be relevant.
- An oral agreement must be complete, certain and enforceable on its own terms to be immediately binding.
- In certain circumstances, regard may be had to subsequent conduct of the parties, including, in the present case, where the parties agreed they would prepare a written document setting out the terms of agreement. In such a case, the court may consider the three categories of contract set out by the High Court in *Masters v Cameron* (1954) 91 CLR 353, 360 and a fourth category recognised by courts subsequently. However, these categories are 'taxonomic and should not distract from the fundamental inquiry' as to 'whether, in all the circumstances, the parties objectively intended to reach a binding agreement'.
- Parties may leave aspects of an agreement to be decided at a later date while agreeing to be immediately bound in respect of other, concluded terms.

COURT OF APPEAL—THE DISPUTE WAS SETTLED

Justice Walker (with whom the rest of the court agreed) noted that it was not in dispute that:

- the parties had reached an agreement as to three key terms;
- the agreement was oral in nature;
- the parties had agreed that it was to be reduced to writing by way of a deed of settlement; and
- other documents would need to be drafted.

However, on the facts, a reasonable observer of the mediation would have concluded that, by the end of the mediation, the parties had made a binding

agreement, albeit one that was later to be reflected in a written document.

Interestingly, this conclusion was reached notwithstanding that:

• the agreement was not reduced to writing on the day of the mediation and no written terms were subsequently signed by the parties;

• the mediation was left 'open' by the Judicial Registrar who facilitated it;

• the proceedings were listed for a directions hearing at the end of the month; and

• there was further correspondence between the parties after the mediation concerning the terms of settlement.

Justice Walker instead relied upon the following:

• As the trial judge found, the parties had reached agreement on the key terms of the settlement, leaving only the machinery for implementation of those terms to be worked out.

• What was said and done by each party at the mediation is important in ascertaining whether the parties intended to be immediately bound by their agreement—the use of the words 'offer' and 'accept' by the parties, and in contemporaneous notes taken by their lawyers, was relevant. Furthermore, the final communication from Mr Englisch to Ms Sully at the conclusion of the mediation was he was pleased that they had settled and wished to 'put the matter to bed'. His Honour held that: 'Considered objectively, that conveys the proposition that the matter was resolved in a binding manner …'. Further, the context of the statement, uttered at the end of a formal mediation the parties had each attended for the express purpose of seeking to resolve their dispute was 'strongly probative' of an intention to be immediately bound.

• Limited weight was given to the fact that the mediator left the mediation 'open' given the parties' direct communications with each other.

• Little weight was given to what was not said at the mediation (i.e. the fact that neither party said the agreement was not binding). 'What is more important is what was said at the mediation, not what was not said.'

• '... the existence of a common practice amongst lawyers of reducing any agreement reached at mediation to writing does not compel a conclusion that at a mediation where the parties do not reduce their agreement to writing, they do not intend to be immediately bound. Rather, in my opinion, the common practice is better understood as a matter of prudence, directed to avoiding the kind of dispute that has arisen in this case.'

• '... the settlement as agreed was uncomplicated, it involved a small quantum, and there was no history of formal negotiations documented in writing that would suggest the parties would not have intended a less formal agreement to be binding. In addition, the time constraints on the mediator meant that the parties were left with no time, within the mediation, to document their agreement; that assists in explaining why the parties, having reached a binding agreement, left the documentation of that agreement to a later date.'

• Limited weight was given to the parties' correspondence after the mediation (including the use of the term 'in principle' by Mr Englisch's solicitor) given its equivocal nature and the fact it was 'post–contractual conduct'.

While agreeing with Justice Walker, Justice Niall further noted that the settlement reached on the day appeared to achieve a favourable outcome for both parties which supported the contention that whatever further steps or documentation were contemplated were to be:

... procedural or facultative in nature … The fact that thereafter the parties appear to have found things to argue about does not change what had already occurred.

KEY TAKEAWAY

Sully v Englisch is a helpful reminder for both mediators and parties engaging in mediation to ensure that any agreement reached is reduced to writing and signed by the parties on the day, even though, as the outcome of the case reveals, an oral agreement can be objectively determined to be immediately binding and enforceable.

Kym Fraser, Kyla Cameron and Jasper Choi's article was previously published on the Clayton Utz web site—September 2022. Published with permission.

TEAM NEGOTIATION CONSIDERATIONS

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IN BRIEF

Much of the literature published on negotiation focuses on how the reader can best approach negotiations, employing various tools and tactics that should ensure conducive discussions lead to a mutually agreeable outcome. This literature often provides for a hypothetical situation or recounts an experience the writer once had with a specific negotiation and, more often than not, the example or recounted situation involves one person negotiating with another.

In most commercial and business contexts this is rarely the case, businesses negotiate in teams and these teams include various different 'players' amidst differing physical, virtual and conceptual settings. A good negotiation team must consider how to plan for the negotiation. The planning should account for utilising players with strengths best suited to varying aspects of the negotiation, whilst also acknowledging the need for adaptation as the negotiation progresses. Negotiation strategies and tactics in a team setting are rarely as simple as a one–on–one discussion, they are far more complex and multifaceted. The literature on this topic is sparse in comparison to individual considerations.

With this in mind: how does the current literature address this level of complexity; can the reader apply individual tactics to team negotiating; and does the literature on team negotiations adequately provide for clear interpretation whilst also addressing the relevant complexities?

INTRODUCTION

This paper will review select literature published on the topic of negotiating, specifically identifying where the literature addresses broader aspects of negotiation and whether that is relevant to individual negotiations or may be applied to team settings.

The paper will also identify literature published on team negotiation and review how well the content deals with the complexities that come with negotiating in groups.

Identifying common themes within the published literatures recommendations will be essential, such as what methods are best used when approaching negotiations and what strategies and tactics must be considered to ensure conducive negotiations whilst also promoting trust and a clear path to a mutually agreeable position. *The Negotiator's Desk Reference* (2017)[1] is a comprehensive source of publications for this literature review.

The Negotiator's Desk Reference features 100 contributors on the topic of negotiation and is acknowledged as covering an impressive array of disciplines,[2] forming one of the most complete sources relevant to negotiation. Amidst the 113 different papers/chapters which form *The Negotiator's Desk Reference*, there is one section dealing specifically with team negotiating.

Upon assessing the literature, the review will discern how well suited the recommended strategies and tactics are to addressing team negotiation considerations and complexities. Answering this question will lead to summarising the assessment and making additional recommendations that should be considered to further develop the art of successful team negotiating in commercial and business settings.

NEGOTIATION NORMS

In what is perhaps one of the most widely covered scholarly topics, negotiation, where is a good place to start? Abramson suggests the most essential negotiation considerations can be summarised in three points; employing good practices, tactics, and tricks.[3]

These three categories can be further defined as follows:

(1) GOOD PRACTICES
How to present and portray yourself as a trustworthy, fair and ethical person. Develop rapport and trust to affirm the relationship. Be mindful of how and when to implement and display such.

(2) TACTICS
Tools a negotiator can use to sway things in their favour. A common tactic includes conveying overshot expectations in hopes of landing in a position you consider reasonable. Another common tactic is simply withholding information that may strengthen the counterparty's position.

(3) TRICKS
Deceptive approaches to the negotiation. This includes leading the counterparty to believe untruthful facts and being purposefully frustrating.

Abramson also suggests a negotiator's style is of importance, noting the effective use of the above points are dependent on identifying what styles are at play and discerning what tools will best work with each negotiator and their applicable situation.[4]

Yi Liao also pays credit to the importance of identifying negotiation styles as a matter of contributing to the necessary awareness and mindfulness required to better understand the parties' assumptions and strategies.[5] In addition to style, Yi Liao notes cultural background as being one of the most important and influential factors to consider and cater to during negotiations.[6]

These two papers/chapters accurately identify the norms which form the foundation of any conducive negotiation, establishing the context and utilising appropriate responses. The authors ask the reader to enter into negotiations being situationally aware, analysing the context and determining the best approach.

When moving on from the broader topics of negotiation, we find the vast majority of publications focus on a specific detail which forms part of the negotiation process.

These topics include:

- ethics;
- culture;
- style;
- psychology;
- trust;
- reasoning;
- power;
- conflict;
- setting; and
- religion.

Each of these topics remain considerations in addressing one of the following questions: where are we; what are we trying to achieve; who are we negotiating with; and what is the best course of action or response?

In Lande's paper 'Taming the Jungle of Negotiation Theories' he notes that after reviewing thirteen books in order to broadly categorise negotiation theory, the content can be summarised under five headings: (i) general; (ii) structure and process; (iii) individual negotiators; (iv) relationships; and (v) interactions.[7]

The content of these headings also assists the reader in addressing the negotiation context and proceeding in a manner that promotes conducive negotiations.

APPLYING THE NORMS TO TEAM NEGOTIATING

Having discerned what the literature says about how the negotiation process should be approached and dealt with we must now ask whether the authors expressly refer to situations in which teams are considered.

For this exercise the paper will focus on Abramson's three categories; (i) good practices; (ii) tactics; and (iii) tricks, whilst attempting to identify the selected literatures express application of recommendations to team negotiating.

INDIVIDUAL GOOD PRACTICES APPLYING TO TEAM NEGOTIATING

The authors do not specifically identify the complexities of applying good practices amidst team negotiating, although Abramson does state certain good practices should be unconditional in that there is a good argument for their use in any circumstance.[8] Similarly Yi Liao notes knowledge of style and culture is something which a negotiator will always benefit from having.[9]

These considerations are indeed an essential part of establishing a sound foundation for any negotiation, regardless of whether they apply to individual or team negotiations.

INDIVIDUAL TACTICS APPLYING TO TEAM NEGOTIATING

Tactics differ from good practices in that their use may or may not be genuine.[10] Appearing genuine is an important aspect of developing trust and relationship between the parties. With this value in mind, and noting that it is not limited to a specific tactic, the use of a tactic poses risks. Should it become known that the tactic stems from non–genuine roots, the trust and relationship building required to enable conducive negotiations is likely to be damaged and the tactic itself be counterproductive.[11]

Granted the authors have acknowledged the above, but not in team negotiating settings. It is obvious using tactics amidst teams would increase complexities and the risk they pose.

INDIVIDUAL TRICKS APPLYING TO TEAM NEGOTIATING

Abramson notes tricks as being highly risky, adversarial and unethical.[12] As with tactics, the risk lies in a non–genuine act being discovered. Abramson also notes the increased use of tricks may result in a more adversarial negotiation.[13]

As with tactics, the author does not acknowledge the increased risk resulting from the complexity of team negotiating should one person amidst the many be utilising tricks. However, it could be said that the warnings are generally implied and should be treated as such.

TEAM NEGOTIATING LITERATURE REVIEW

Of the 113 chapters/papers that form *The Negotiator's Desk Reference* only three attempt to correlate the challenges of team negotiating with the use of good practices, tactics and tricks. These three chapters/papers are titled 'Thinking Ahead',[14] 'Two Heads are Better than One'[15] and 'The Organisation as Negotiator'.[16]

THE ORGANISATION AS NEGOTIATOR

In 'The Organisation as Negotiator', Borbély and Caputo acknowledge that most literature published on negotiation is in the context of individual one on one negotiations where one person prepares for and carries out the negotiation process. They critique the literature as focusing too much on the detail of negotiating, arguing that the bigger picture may be lost.[17]

The author's paper focuses on how the organisation can be positioned and structured to gain maximum value from the negotiation process, noting that organisational negotiation should identify common strengths and values and be a systematic process which is led from the top down rather than by individuals.[18]

Where this chapter/paper fails to sufficiently address team negotiation is that it assumes (and recommends) one consistent style can be adopted by the organisation and their team. Contrary to this, and as Yi Liao highlights in her chapter/paper 'Styles and Culture in Negotiation,' negotiation styles are influenced by a number of differing factors such as cultural dimensions and individual philosophies;[19] factors applying to individuals which an organisation cannot control.

TWO HEADS ARE BETTER THAN ONE

In 'Two Heads are Better than One', David F Sally, et al. refer to research that suggests team negotiating is superior to that which is led by the individual.[20] The authors found that more information is exchanged in a team negotiation setting and this provides an environment where a mutually beneficial position between the parties is easier to discern.[21] It is also noted that a lack of coordination will often serve to disadvantage the negotiators as teams must plan for and execute certain tactics as a collective group. The authors discuss the use of leveraging one person's relationship in order to play out the good cop/bad cop tactic along with leveraging one's cultural norms to reach agreement.

The authors point out that a lack of coordination and failing to determine who is in charge are common pitfalls in team negotiating, typically found in competitive teams.[22] These points serve the topic of team negotiating well. However, there is limited recommendation on how to overcome a competitive team whom have not been able to cooperate and agree who will lead the negotiations. In this regard, the literature is lacking substance.

THINKING AHEAD

In a tone similar to 'The Organisation as Negotiator,' James P Groton, et al. analyse the importance of planning for organisational dispute management in their chapter/paper 'Thinking Ahead'.[23] As with most literature on negotiating, clear communication and coordination between the parties is the leading recommendation in dispute resolution.

The chapter/paper recommends organisations develop systems and processes to promote and maximise efficient cooperation. Of interest 'step negotiating' is recommended as an effective negotiation system where organisational levels deal with the issue from the lowest chain of command first and in ascending order thereafter.

Unfortunately, the authors do little to acknowledge that negotiations are led by people, and those placed positions of authority are not necessarily there because of their success in the realms of negotiation. Identifying and placing people in accordance with their strengths and weaknesses is much more important to the structure of a team, regardless of one's authority. The authors fail to identify this.

TEAM NEGOTIATION CONSIDERATIONS

The literature this paper has referenced is not unique in that it conveys a clear and general message to negotiation practitioners; preparedness, communication and information is of paramount importance. However, should negotiations take place in a team setting there will always be an added layer of complexity to be considered.

The below table provides a comparative list of a few select considerations as they apply to both individual and team negotiations:

INDIVIDUAL CONSIDERATIONS

Context

Where are the negotiations being held?

- Online:
    - Is software required
    - Is hardware required
    - Do you have the software
    - Do you have the hardware
- In person:
    - In a private setting
    - In a public setting
    - What is the travel time
    - Are there travel requirements
    - Is accommodation required
- What materials to bring:
    - Key documents
    - Pen and paper
    - Laptop
    - Data (USB, hard drive, etc.)

TEAM CONSIDERATIONS

Context

Where are the negotiations being held?

- Online:
    - Is software required
    - Is hardware required
    - Do you have the software
    - Does your team have the software
    - Do you have the hardware
    - Does your team have the hardware
    - Does your team know how to use the software
    - Does your team know how to use the hardware
- In person:
    - In a private setting
    - In a public setting
    - What is the travel time for you
    - What is the travel time for your team
    - Are there travel requirements for you
    - Are there travel requirements for your team
    - Is accommodation required for you
    - Is accommodation required for your team
- What materials to bring:
    - Key documents in your charge
    - Key documents in your team's charge, and by who
    - Pen and paper
    - Your laptop
    - Your team's laptops
    - Data (USB, hard drive, etc.) in your possession
    - Data in your team's possession

INDIVIDUAL CONSIDERATIONS

Negotiation Parties

Who are the negotiation parties?

- Yourself:
    - Are you qualified
    - Are you authorised
    - Are the counter parties expecting you
    - Will the counterparty(s) be pleased to receive you
    - How should you introduce yourself

TEAM CONSIDERATIONS

Negotiation Parties

Who are the negotiation parties?

- You and your team:
    - Are you qualified
    - Are your teammates qualified
    - Are you authorised
    - Who has what authority in your team
    - Are the counter parties expecting you
    - Are the counter parties expecting your team

- Counterparty(s):
    - Are they qualified
    - Are they authorised
    - Are you speaking to the right person
    - Are they aware of the subject matter
    - Is there an existing relationship or prior dealing
    - Do you know their style
    - Are there any obvious cultural considerations
    - Are there any power considerations
    - Will the counterparty(s) be pleased to receive you
    - Will the counterparty(s) be pleased to receive your team
    - How should you introduce yourself
    - How should you introduce your team
    - Are there any obvious cultural considerations of your teammates
    - Are there any power considerations of your teammates
- Counterparty(s):
    - Are they qualified
    - Are they authorised
    - Are you speaking to the right person
    - Are they aware of the subject matter
    - Is there an existing relationship or prior dealing with you
    - Is there an existing relationship or prior dealing with anyone from your team
    - Do you know their style
    - Does a member of your team know their style
    - Are there any obvious cultural considerations
    - Are there any power considerations

INDIVIDUAL CONSIDERATIONS

Subject Matter

What are you negotiating with the counterparty(s)?

- From the counterparty(s) position:
    - Do you know their wants
    - Do you know their needs
    - Do you understand their interests
    - Do you understand their limitations
    - Do you agree with the value
- From your position:
    - What are your wants
    - What are your needs
    - What are your limitations
    - Do you have a Best Alternative to a Negotiated Agreement (BATNA)
    - Are you aware of a Worst Alternative to a Negotiated Agreement (WATNA)
    - Are you aware of anything not specific to the deal that may be offered
    - What information should be guarded
    - What information should be shared

TEAM CONSIDERATIONS

Subject Matter

What are you negotiating with the counterparty(s)?

- From the counterparty(s) position:
    - Do you know their wants
    - Does your team know their wants
    - Do you know their needs
    - Does your team know their needs
    - Do you understand their interests
    - Does your team understand their interests
    - Do you understand their limitations
    - Does your team understand their limitations
    - Do you agree with the value
    - Does your team agree with the value
- From your position:
    - What are your wants
    - What are your team's wants
    - What are your needs
    - What are your team's needs
    - What are your limitations
    - What are your team's limitations

- General subject matter considerations:
    - Is there a deadline
    - Are there stages to the negotiation
    - Are there potential synergies at play

    - Do you have a Best Alternative to a Negotiated Agreement (BATNA)
    - Does your team have a Best Alternative to a Negotiated Agreement (BATNA)
    - Are you aware of your Worst Alternative to a Negotiated Agreement (WATNA)
    - Are you aware of your team's Worst Alternative to a Negotiated Agreement (WATNA)
    - Are you aware of anything not specific to the deal that may be offered
    - Is your team aware of anything not specific to the deal that may be offered
    - What information should be guarded
    - Is your team aware of information that should be guarded
    - What information should be shared
    - Is your team aware of information that should be shared
- General subject matter considerations:
    - Is there a deadline
    - Is your team aware of the deadline
    - Are there stages to the negotiation
    - Is your team aware of any stages to the negotiation
    - Are there potential synergies
    - Is your team aware of any potential synergies

Solely from a visual perspective of the above comparison, it is clear that involving a team in negotiations can double the amount of considerations.

The astute reader will also have noticed that the tabled considerations do not take into account the following: where good practices can be demonstrated; where tactics could be utilised; and where tricks may be deployed. The tabled considerations are limited to those essential to ensuring initial alignment between yourself and your team members. These considerations form a crucial part of the information gathering required for planning and preparedness.

Establishing this level of preparedness is of key importance, and not well covered in the reviewed literature. It is as Borbély and Caputo said, most literature on negotiation focuses too much on the detail[24] which draws attention away from the bigger picture in which these tabled points reside. When also considering this many variables only form the first steps in gathering information for the negotiation, such planning in a team setting is clearly no small feat. As noted by Chris Voss in his widely sold book *Never Split the Difference*:

When the pressure is on, you don't rise to the occasion—you fall to your highest level of preparation.[25]

Therefore, the majority of literature need not focus on specific details and lofty insights into the human psyche amidst the heat of negotiating as much as it should focus on initial planning. If done correctly, planning will uncover the majority of negotiation literatures specific considerations and enable easier application of them thereafter.

RECOMMENDATIONS

Planning is key to the negotiation process. More often than not, the lack of a plan will result in a less than satisfactory outcome. To quote Benjamin Franklin:

If you fail to plan, you are planning to fail!

Imagine yourself attending the first stage of a negotiation with very little knowledge at hand, you know what the subject matter is but you have not considered the context or how to best approach the deal with your counterparty. Now consider the same situation, but in a team setting. Not only have you got the deal to worry about but also a number of colleagues

Gathering information, developing context and planning for the negotiation process, which will play to the teams' strengths, is a far safer investment for the learned negotiator than attempting to become the negotiation chameleon which the existing literature dominantly suggests.

who will bear witness to your potential failings and reputational impact. Again, the team setting has increased the complexity and in turn the required level of consideration.

It is this increase in complexity that should motivate the negotiator to plan a way forward with their team. This paper recommends planning for negotiations by contextualising and strategizing against three categories, those of which are detailed below:

THE FIVE W'S (WHO, WHAT, WHEN, WHERE, WHY)

The Five W's are commonly taught primary/elementary school students, these questions ring true to the information gathering process. Negotiators are encouraged to write down these five questions and ensure each person involved in the negotiation process is familiar with the answers as they apply to the deal:

Who are the parties involved in the negotiation, from both sides? Consider each person's qualifications, experience and any knowledge of prior dealings. Are there cultural and/or power considerations?

What are the parties trying to achieve, from both sides? It is important that you and your team share a common goal, it is equally important that knowledge of the counterparty(s) wants and needs exists.

When will the parties meet? Understand time constraints and ensure you have allowed for your own team to plan and discuss the deal before entering into negotiations with the counterparty(s).

Where will the negotiations take place? Are the negotiations to take place in person or online (virtually)? There are numerous considerations that come with both options, some of which are detailed in the above section of this paper. You must also consider which option is likely to produce the desired outcome, e.g. If a decision maker is only available virtually, would that be the best form of meeting?

Why have the parties engaged with each other? Consider any relevant history you or your team may have with the counterparty(s), is there an existing relationship to leverage? Are there other businesses with the same offering or have you gone to the counterparty(s) because there is nowhere else to go?

ROLE ASSIGNMENT, ALIGNMENT AND COLLABORATION

Having gathered the relevant information needed to establish the preliminary context of the negotiation, your team must ensure that each member has appropriately assigned roles, that they understand the context and that they are aligned with the other team members to enable a collaborative approach in implementing the agreed strategy.

The negotiation team should consider assigning the appropriate people to the following roles:

LEADER

Who from the team will lead the negotiations? This includes managing aspects such as the introductions, scheduling internal (with the team) and external (with the counterparty(s)) meetings. Also consider the leader's authority, will they be able to make decisions on behalf of the team or will they summarise points for collective review and approval with the team thereafter?

The leader is also likely to be charged with ensuring the negotiations proceed as smoothly as possible, having the authority to cut–in or overrule other members. In this regard they should possess qualities that allow them to be calm, respectful and assertive

whilst also being accommodating and respected. The leader may play other roles in the negotiation process.

RELATIONSHIP MANAGER
Who from the team will manage the relationship between the parties? The relationship manager should have authority to make decisions whilst ensuring that future risks and opportunities are considered during the negotiation process.

COMMERCIAL MANAGER
Who from the team will understand the trade in risk and how those best placed to manage the risk will be left owning it? The commercial manager should be responsible for ensuring the terms and conditions of the agreement are contextualised and accurately represent the balance of risk between the parties.

LEGAL REPRESENTATIVE
Who in the team is qualified to understand the legal risks, obligations and entitlements that the terms and conditions of the deal pose? The legal representative must also ensure the parties conduct is free from any misleading or deceptive actions or speech and is free from risk to legislative compliance.

TECHNICAL REPRESENTATIVE
Who will ensure what the business is attempting to acquire, be it services or a product, will be fit for purpose.

WORKING WITH WHAT YOU'VE GOT

Having assigned the team members to their respective roles, it is important that you also identify which team member possess the skill or style required to work with and respond to differing challenges that will undoubtedly be faced during the negotiations.

Dominantly, these challenges are likely to include overcoming opposing styles, tactics and tricks. As the vast majority of literature on the negotiation process focuses on these categories in detail, it would be foolish to attempt to summarise each in a few paragraphs, instead the reader is asked to consider the below points as a common sense approach to team negotiating:

GOOD PRACTICES
The foundation of any negotiation should be formed on good practices. Negotiators should be polite, courteous and considerate. Most negotiations form part of an ongoing relationship and must be established positively from the onset. It would be unwise for a negotiating team to assign a leader who lacked the ability to discern basic social cues. The leader must facilitate an environment for conducive negotiations, ensuring good practices are upheld not only from themselves but also their team members.

TACTICS
Negotiators must consider how to address differing styles as their foremost tactic. As noted by Yi Liao, a negotiators style is influenced by their background, personality, culture, experience and skills. These factors combined result in a person's approach to decision making.[26]

Often it is argued that a negotiator should be able to adapt their style to respond to those encountered from their counterparty(s), but an equally good argument would suggest this is a skillset not mastered by many. Instead, identifying a counterparty(s) style and allocating the member of your team who possesses a responding style should be the primary tactic for overcoming the associated challenges.

For example;

(a) Analytical styles may respond well when collaborating with other analytical parties. This style may want to review data and work with numbers, they may not respond well to an assertive counterparty.

(b) Accommodating styles may be unlikely to get much done with an equally accommodating counter party. It may be advantageous to allow this style to lead discussions, listening for any oversharing, at which point you may take advantage with mild assertiveness.

(c) Assertive styles may be unlikely to see things from your point of view, meaning you must lead this style to their own conclusions. An analytical style, framing queries stemming from data in which the result works in your favour, may be a well deployed response to an assertive counterparty.

There are other tactics a negotiator may utilise, or be forced to respond to. These include being undersold, dealing with restricted timelines, making it appear as though the deal cannot proceed on certain terms, etc. All of which should be addressed by the person whose style responds well to the instigator. Responding in this way ensures the negotiations continue collaboratively and challenges are fleshed out along the way.

TRICKS
Utilising tricks well is a matter of experience. Ideally, team members would be familiar with any applicable tricks and are able to formulate a plan where they may be utilised. However, as was noted by Abramson, the use of any tricks will increase the risk of the negotiations failing.[27] Their use must be considered seriously.

A good negotiator must first ask themselves, is the use of a trick necessary to reach an agreement?

A good negotiator must also be aware of tricks being utilised on them. Responding to tricks is a matter of confidence in that the negotiator must remain calm and unprovoked, determining how to deal with the trick in order to gain an edge on the negotiations.

CONCLUSION

Much of the literature published on negotiation applies to both individual and team settings, the problem is that it assumes the negotiator's ability to analyse varying situations and adapt to an array of differing challenges. Unless you possess a level of negotiation mastery, it is unlikely you will be able to adapt and respond to such challenges in a seamless manner. It is more likely that, when thrown these 'curve balls', you will need time to consider and respond.

As opposed to analysing each situation as it is presented, this paper encourages the reader to gather preliminary information which can then be used in planning. This plan should also include the allocation of team members who are able to respond to challenges with the relevant skill, style or experience.

Upholding conducive negotiations must be a priority. The environment must enable seamless and continual discussion in order to establish trust and build on relationships. Planning also enables the negotiation team to promote such an environment through having first considered the varying elements at play and then having the prepared response and/or responding party be utilised.

Gathering information, developing context and planning for the negotiation process, which will play to the teams' strengths, is a far safer investment for the learned negotiator than attempting to become the negotiation chameleon which the existing literature dominantly suggests.

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ELECTRONIC CONTRACTING MADE EASIER IN AUSTRALIA

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INTRODUCTION

In a digital world, it is important that the law supports businesses to operate on a remote, and often cross–border, basis. Changes made to the *Corporations Act 2001* (Cth) (the Act) in Australia earlier this year facilitate this as they make it easier for businesses to enter into contracts electronically.

Two main changes were made to the process of document execution when the Act was updated in February.

First, the law was amended to allow companies to execute documents electronically on a permanent basis, extending a temporary measure that was introduced during the COVID–19 pandemic.

Second, the changes allow sole directors of proprietary companies to execute documents on their companies' behalf in accordance with section 127 of the Act. Previously this was only possible if the director appointed themselves as company secretary prior to signing.

These changes have simplified the signing process and have provided companies with additional methods for executing documents. Sections 126, 127 and 129 of the Act have all been amended.

MORE DETAIL ON EXECUTION

In addition to 'wet ink' signature in physical form by hand, company documents and deeds can now also be signed electronically. Electronic signing programs such as DocuSign are now an ongoing method of valid execution for companies.

Companies may execute documents in counterparts and signatories are not required to use the same method or form as another signatory. Signatures are also not required to be affixed to the entire content of a document.

MORE DETAIL ON PROPRIETARY COMPANIES

Sole directors of proprietary companies with no company secretary are now permitted to sign documents, including deeds, on behalf of the company in accordance with section 127 of the Act.

To align with this change, the assumptions under section 129(5) of the Act have been extended. A person may now assume that a person who has signed on behalf of a company is a director, company secretary, sole director, or both a sole director and company secretary of that company.

ADDITIONAL AMENDMENTS

The previous position in respect of agents was that an agent could not sign a deed on behalf of a company unless they were appointed as an attorney by the company pursuant to a deed, such as a power of attorney. Individuals executing the company's powers would also need to have their signature witnessed.

Section 126 now provides that an individual does not need to be authorised or appointed by a deed to exercise the company's powers, and may now duly execute a deed, whether physically or electronically, without their execution being witnessed. In practice, this means authorised agents may be appointed by a company to execute deeds on behalf of that company. The amendment overrides any contrary state and territory legislation.

These changes apply to documents executed on or after the 23 February 2022.

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WHEN IS A CONTRACTOR ENTITLED TO TIME AND/OR COSTS DUE TO COVID–19 RESTRICTIONS UNDER STANDARD FORM AS DOCUMENTS?

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BACKGROUND

Following the wider reopening of the construction industry in Melbourne, it may be an appropriate time for many principals and contractors to revisit their construction contracts to understand their rights and obligations with respect to extension of time and delay damages.

For the purposes of this note we review the relevant clauses set out in an unamended AS 4000–1997 / AS 4902–2000 and AS 2124–1992 / AS 4300–1995. We note, however, that it is common for parties to amend these standard form documents, and that these amendments may affect their respective rights and obligations in relation to COVID–19 issues.

EXECUTIVE SUMMARY

The general position under the unamended AS 4000–1997 / AS 4902–2000 and AS 2124–1992 / AS 4300–1995 is as follows. As a general rule of thumb the risk profiles are similar under AS 4000–1997 / AS 4902–2000 and AS 2124–1992 / AS 4300–1995.

UNDER AS 4000–1997 / AS 4902–2000

A COVID–19 delay such as industry shutdown or capacity limits may be a change in legislation that could not have been reasonably anticipated. If so:

(a) there is no express right for the contractor to be entitled to an EOT (extension of time). It is arguable that the superintendent will be obliged to give one despite there being no express right as part of their discretion; and

(b) the contractor may be entitled to additional costs (but arguably no margin), but only if Annexure Part A lists the affected WUC (works under construction). If no WUC is listed in Annexure Part A, then the contractor will not be entitled to additional costs.

This is a critical point to check for each specific contract.

UNDER AS 2124–1992 / AS 4300–1995

A COVID–19 delay such as industry shutdown or capacity limits may be a change in law and delays/directions by authorities that could not have been reasonably anticipated. If so:

(a) the contractor is entitled to an EOT;

(b) the contractor is entitled to additional costs (plus margin) for changed work methods; and

(c) there is no express right to delay damages unless stated in Annexure Part A, but these costs may be included in the assessment of changed work methods per the paragraph (b) above.

Regardless of whether the contractor is able to claim an EOT, it is still obliged to give a notice of delay should one occur. If it is entitled to an EOT, then it must give notice per the procedure in the contract.

AS 4000–1997 / AS 4902–2000

PANDEMICS / FORCE MAJEURE

AS 4000–1997 / AS 4902–2000 does not include any clauses specifically dealing with pandemics or force majeure events.

AUTHORITIES AND LEGISLATIVE REQUIREMENTS

Under the AS 4000–1997 / AS 4902–2000 a contractor is entitled to costs for changes in legislation if that change affects the works or any WUC stated in Annexure Part A.

A COVID–19 delay will not affect the physical works—just the WUC that a contractor must perform to complete those physical works.

Therefore, a contractor will only be entitled to additional costs if there is WUC stated in Annexure Part A.

Put another way, if there is no WUC stated in Annexure Part A, the contractor will not be entitled to costs.

There is arguably no right to a margin for profit on top of these costs. There is no right to an EOT.

DELAYS BY AUTHORITIES

AS 4000–1997 / AS 4902–2000 does not include any clauses specifically dealing with delays caused by authorities.

This is a risk allocated to the contractor.

AS 2124–1992 / AS 4300–1995

PANDEMICS / FORCE MAJEURE

AS 2124–1992 / AS 4300–1995 does not include any clauses specifically dealing with pandemics or force majeure events.

AUTHORITIES AND LEGISLATIVE REQUIREMENTS

Under clause 35.5 of AS 2124–1992 / AS 4300–1995 the contractor is entitled to claim an EOT for:

(a) changes in the law;

(b) directions by public or statutory authorities; and

(c) delays by public or statutory authorities.

These would likely apply to a COVID–19 delay, and so the contractor will be entitled to an EOT.

If a contractor is or will be delayed in reaching practical completion by such a cause and within 28 days after the delay occurs the contractor gives the superintendent a written claim for an EOT, the contractor shall be entitled to an extension of time for practical completion.

Under clause 14.1 and 14.2, a contractor is entitled to be paid for a variation where a statutory requirement (including a direction given by persons exercising their statutory powers) which necessitates a change in the contractor's method of working.

If this change causes the contractor to incur more costs, the difference shall be valued as if it was a variation (i.e. with a margin) under clause 40.5.

This would likely apply to a COVID–19 delay, and so the contractor will be entitled to its additional costs plus a margin. Although there is no express right to claim delay damages for these delays under clause 36, it is likely that an assessment of the variation in the paragraph above would include some or all of such delay costs—either in the cost of the work or the margin.

Additionally, if a change in statutory requirements necessitates a change to the method of working, as may be specified in the contract, the superintendent shall direct a variation under clause 40.1. This would then entitle the contractor to an EOT pursuant to clause 35.5(b)(iv).

... it is common for parties to amend these standard form documents, and that these amendments may affect their respective rights and obligations in relation to COVID–19 issues.

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BUT IF I CHANGE THE PLANS BY 10 PER CENT THAT'S OK, ISN'T IT?

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You'd be surprised how often we are confronted with a homeowner who, having obtained a set of plans from one homebuilder,[1] then wants to use those plans with another homebuilder.

When such people are met with advice to the effect that:

- the homebuilder may have copyright in the plans which they prepared;
- the homeowner may not be able to use the plans without the approval of (and often payment to) the homebuilder;
- the use of the plans could expose the homeowner to significant civil liability (including urgent injunctions, damages, and court orders requiring the homeowner to make, expensive physical changes to the home 'post construction';[2] and
- in one case, we are aware that the original homebuilder reported the use of such plans as a theft, which resulted in police executing a search warrant,

they often utter the immortal words:

But if I change the plans by 10 per cent that's ok, isn't it?

Met with a fairly stiff 'no' in response, such homeowners are usually adamant that 'Uncle Kevin' or 'Bill from down the street, who is a law student/architect' has assured them that the above is correct.

Whilst we cannot say from whence the 10 per cent rule came from, with respect; it is not correct. Like the Loch Ness Monster, it's a myth. As the homeowners recently discovered in *Look Design and Development Pty Ltd v Edge Developments Pty Ltd & Flaton* [2022] QDC 116 (*Look Design*).

Now, the damages in the case were not, in the big scheme of things, significant (particularly by comparison with other cases where plans have been misused)

Whilst we cannot say from whence the 10 per cent rule came from, with respect; it is not correct. Like the Loch Ness Monster, it's a myth.

but for the homeowners (and the homebuilder who ultimately constructed the home, and who became the first defendants in the proceeding), the unrecoverable costs incurred in defending the matter would have been significant.

This leaves aside simply the stress of being involved in litigation for a long period (the proceeding was commenced in 2017, the trial was in August 2020, and judgment was handed down in May 2022).

Had the homeowners been properly advised, they would have known:

• that the person who prepares plans often (not always, but often) retains copyright in those plans;

• that using plans in which another person owns the copyright without permission, can lead to liabilities; and

• if there is a dispute, the court will perform a 'qualitative' not a 'quantitative' analysis of the plans. in determining whether one plan is a 'copy' of another, the court will often evaluate whether the 'copy' adopts (or takes) the 'heart' of the original.

So what should the homeowners have done?

First, when the homeowners engaged the original homebuilder to draw the original plans, they should have addressed their right to use the plans in the original contract (noting that most homebuilders have homeowners sign an 'early works' style agreement which deals with issues such as the drawing of plans, taking soil samples etc), for example they might have sought legal advice, and then negotiated with the homebuilder to pay a licence fee for the plans, allowing them to use the plans even if the homeowners chose to engage another homebuilder to complete construction.

Second, when the homeowners decided to engage a different homebuilder than the one who had prepared the original plans, they should have sought legal advice and they should have:

(a) sought to negotiate a licence fee with the original homebuilder to allow the use of the plans (perhaps upon terms which would have required the second homebuilder to destroy copies of the original plans etc after the design process); or

(b) sought to negotiate with the original homebuilder with respect to a regime whereby:

(i) the original homebuilder allowed the original plans to be provided to the new homebuilder;

(ii) the new homebuilder would design a set of plans; and

(iii) a licence fee would be agreed for us of the new plans.

Third, not used the original plans and/or sought legal advice and an independent review of any new plans to ensure that they did not infringe on the original homebuilder's copyright.

Equally, *Look Design* contains a warning for homebuilders and those who prepare plans (such as architects). Ideally, your design agreement should deal with issues of copyright and breaches of same (including potentially consent injunctions and agreed damages clauses).

If your contract does not deal with these issues, then you will need to take a commercial approach to such disputes, noting that the damages which were awarded against the homeowners in *Look Design* would have been dwarfed by the unrecoverable costs associated with the litigation.

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NEW SOUTH WALES GOVERNMENT SETS REFORM AGENDA FOR BUILDING STANDARDS

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INTRODUCTION

The New South Wales Government has an ambitious agenda for the reform of building legislation in light of high–profile building failures and defect issues.

The reform process for New South Wales building legislation has taken another step, with the release last month of the New South Wales Government's response to the Public Accountability Committee's report from the 'Further inquiry into the regulation of building standards', released in February.

Its 20 recommendations focused on the efficacy and adequacy of the regulation of building standards in New South Wales.

We highlight below some of the key responses to the Committees' recommendations, many of which will generate further public consultation and legislative change.

NO BUILDING MINISTER OR STANDALONE BUILDING COMMISSION TO BE ESTABLISHED

While the Committee recommended the establishment of a single, senior Building Minister and a standalone Building Commission, the New South Wales Government considered that the Office of the Building Commissioner (OBC) within the Department of Customer Service (DCS) is already effectively carrying out this role and no separate Minister or Commission is needed.

The New South Wales Government also didn't support the recommendation that the private certification scheme be abolished and a new Building Commission to be empowered to carry out this function in consultation with local councils.

EXTENSION OF BUILDING LEGISLATION BEYOND CLASS 2 BUILDINGS

The Committee recommended the expansion of the Commissioner's powers to class 1 buildings (i.e. single dwellings), but in fact the New South Wales Government is planning to expand the Commissioner's powers into a number of other building classes.

It has released for consultation a suite of new legislation that will implement wide–ranging reforms, including the expansion of the Commissioner's powers under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2022* (NSW) (RAB Act) to all building classes and a new licensing regime to cover the design and construction of all building classes (not just residential buildings).

Stay tuned for a more detailed analysis of the proposed changes.

PHOENIXING IN BUILDING AND CONSTRUCTION INDUSTRY

The Committee recommended that the New South Wales Government implement additional statutory controls on phoenixing and phoenixing activity in the building and construction industry.

The New South Wales Government supported this recommendation and affirmed its commitment to respond to illegal phoenixing by partaking in the Commonwealth Phoenix Taskforce.

The New South Wales Government also outlined additional steps it is taking, including:

- the rollout of the iCIRT developer rating tool;
- working with the industry on the design of a decennial liability insurance product to give a remedy to consumers dealing with defects;
- improving data sharing arrangements with other regulators; and
- consulting on amendments to legislative frameworks to help regulators track down companies and directors who have participated in illegal phoenixing.

OBC AND NSW FAIR TRADING TO ENSURE PROCEDURAL FAIRNESS FOR DECISIONS ABOUT BUILDING PROHIBITION ORDERS TO PROTECT THE RIGHTS OF PURCHASERS

This recommendation was supported and noted to be the subject of stakeholder consultation. In particular, the New South Wales Government is consulting on the Building Compliance and Enforcement Bill 2022 (NSW) which would expand enforcement powers under the RAB Act to all buildings and include clear procedural fairness requirements.

It would also change the process for imposing and removing orders under the RAB Act.

ESTABLISH A PROGRAM OF SUPPORT AND EDUCATION FOR STRATA RESIDENTS AND OWNERS CORPORATIONS ON STRATA SCHEME OPERATION AND GOVERNANCE

This recommendation was supported and noted to be the subject of stakeholder consultation and upcoming legislative reform.

IMPROVING FIRE SAFETY

The New South Wales Government has commenced the design and implementation of the recommendations in Construct New South Wales's report on Improving Fire Safety. As part of this, it has commenced consultation on:

• a draft Environmental Planning and Assessment (Developer Certification and Fire Safety) Amendment (Fire Safety) Regulation 2022 (NSW) which would improve compliance with requirements for design certification and maintenance of fire safety measures, as well as requiring certification of installed fire systems by an accredited certifier before issue of an occupation certificate; and

• a draft Building Bill 2022 (NSW) which would move all fire safety obligations into a single regulatory framework, including an end–to–end licensing process for all practitioners working on fire safety systems.

SUFFICIENCY OF COUNCIL FUNDING FOR REGULATORY AND COMPLIANCE ACTIVITIES

The Committee recommended that the New South Wales Government review the adequacy of clause 1 of Schedule 1 of the Environment and Planning and Assessment Amendment (Compliance Fees) Regulation 2021 (NSW) in allowing councils to fund regulatory and compliance activities. This clause prohibits councils from charging compliance levies on development applications.

The New South Wales Government did not support this recommendation as it considered that the regulatory amendment has met its objective of transparency, accountability and consistency of approach. Despite this, the New South Wales Government acknowledged the pressure on councils and commented that it is continually looking at other measures to support them in undertaking their functions.

GOVERNMENT MANAGEMENT AND OVERSIGHT FOR FUTURE GOVERNMENT–ENDORSED OR REGULATED RATING SYSTEM FOR CORPORATE ENTITIES RESPONSIBLE FOR CLASS 2 BUILDINGS

The New South Wales Government disagreed with the recommendation that rating systems should be overseen by government. Its view is that ratings tools should be driven by market operators, such as the operation of the iCIRT rating tool by Equifax. This is intended to put responsibility on industry players to call out untrustworthy players.

KEY TAKEAWAYS FOR THE NEW SOUTH WALES CONSTRUCTION INDUSTRY

The New South Wales Government has an ambitious agenda for the reform of building legislation in light of high–profile building failures and defect issues. This commenced over the past two years with the appointment of the Building Commissioner and the introduction of the DBP Act (*Design and Building Practitioners Act 2020* (NSW)) and the RAB Act, and will now continue to a full overhaul of the New South Wales regulatory scheme for residential and commercial buildings. Stay tuned for our further analysis of the upcoming changes, and your opportunity to shape them through the consultation process.

Lina Fischer and Danielle Mizrahi's article was previously published on the Clayton Utz web site—September 2022. Published with permission.

OFF THE PLAN GOES OFF

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INTRODUCTION

A recent decision of the New South Wales Court of Appeal focuses attention on the terms of the sale contract when developers sell units 'off the plan' (*Rialto Sports Pty Limited v Cancer Care Associates Pty Limited; CCA Estates Pty Limited; Davjul Holdings Pty Limited; Armmam Pty Limited* [2022] NSWCA 146).

BACKGROUND

Rialto Sports Pty Limited (Rialto) owned and developed a four–storey commercial strata building consisting of 27 units at the Kingsway, Miranda. In early to mid–2014, prior to completion of the building, Rialto entered 'off the plan' contracts of sale for some of the units. The building was completed in October 2014. After completion, in September 2015, other units were sold to other purchasers.

The builder engaged by Rialto went into liquidation in January 2016.

The façade cladding of the building was constructed with aluminium composite panelling ('ACP') cladding containing a polyurethane content of 87 per cent. This material is now banned for use in buildings of this type.

In April 2018, four unit owners each commenced separate proceedings against Rialto. The owners' corporation and the other unit owners did not join into any of the proceedings.

The main aspect of the claims related to the use by the builder of the ACP cladding and defective waterproofing on the façade. The owners' corporation imposed a special levy of $660,000 in August 2020 to fund the removal and replacement of the cladding. The total claim for defects in the common property was $1.35 million.

The claims were heard in the District Court of New South Wales and were based on the terms of the contracts of sale of the units. Rialto appealed the decision of the District Court to the Court of Appeal.

One of the grounds of the appeal was the alleged failure of the judge to provide adequate reasons for the decision.

The Court of Appeal upheld this ground and then proceeded to provide comprehensive reasons dealing with the other grounds of appeal.

CONTRACT TERMS

In relation to the 'off the plan' purchases, the contracts contained construction obligations in differing terms. One contract stated the obligation as follows:

The building in which the said unit is situated is in the course of construction and shall be constructed by the vendor in a proper workmanlike manner in accordance with the plans and specifications approved by the Sutherland Council.

Two other contracts had the obligation to construct in these terms:

Before completion the vendor must cause the construction and completion of the building in a proper and workmanlike manner in accordance with the development consent.

RIALTO'S SUBMISSIONS

Rialto submitted that the contracts required it to ensure the building was constructed but did not require Rialto to construct the building itself. For that reason, Rialto said its obligation as the developer was to use its 'best endeavours' to cause the building to be constructed in a proper and workmanlike manner. Rialto said that by engaging the builder it had discharged that obligation.

Rialto pointed to the terms of the contracts offering to the individual unit holders a narrow window of time within which to claim for the rectification of defects.

COMMON PROPERTY ARGUMENT

Rialto also said that given that the individual unit holders were not provided with ownership of the common property, it was nonsense to suggest that Rialto was providing a warranty to the individual unit owners for the façade of the building.

In any event, said Rialto, the individual unit owners were not able to make a claim for defects in the common property and were not suffering loss as this was a loss suffered by the body corporate.

MERGER

Rialto also said that its obligation to construct in a workmanlike manner had ceased at the point of completion of the property transfer under the legal principle applicable to the sale and transfer of land known as merger.

The concept of merger has a special place in the sale and purchase of land, where typically, the parties identify any clauses in the contract that do not terminate at the time of the transfer of the land. This has been a longstanding principle in order to have finality at the time of the sale and transfer of land.

The contracts identified some clauses that were said to survive the completion of the building work. The contracts did not expressly state that the obligation to construct in a workmanlike manner survived completion.

THE COURT'S DECISION

In relation to the contract terms, the court accepted that there was no obligation on Rialto itself to carry out the construction. However, the court rejected Rialto's suggestion that by engaging the builder to carry out this work, it had discharged its obligations under the sales contracts.

The obligation was to construct the building in a workmanlike manner and the fact that Rialto subcontracted the work to a builder did not excuse Rialto from its good workmanship obligations to the purchasers.

As to the common property submission, the court said that each individual unit holder was directly impacted by the defects in the common property and was an equitable owner of that property. Each unit holder had suffered loss by reason of the raising of the levy to carry out the replacement and repairs to the façade.

In relation to the merger argument, the court held that it was well established law that the right to enforce a vendor's obligation to construct a building on the property in the manner set out in the contract, is a right 'collateral' to the conveyance which does not merge on completion.

Having determined these issues of liability, the Court of Appeal referred the dispute out to an expert to determine the appropriate methods of rectification of the façade and the water ingress and for determinations of quantum of any remedial work, including defects to individual apartments as claimed.

CONCLUSION

Developers and purchasers should consider the terms of their sale and purchase contracts. Where the contracts include an obligation to construct in a workmanlike manner or in a manner compliant with the National Construction Code, the developer may find itself liable for defective work if the builder it engaged is unwilling or unable to meet claims brought for rectification.

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COURT DISMISSES RIGOROUS LEGAL ANALYSIS AND EXCESSIVE FORMALITY FOR SECURITY OF PAYMENT ADJUDICATIONS

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INTRODUCTION

The purpose of security of payment (SOP) adjudication is to promptly hear and determine payment claim disputes, and to provide certainty for the parties about their rights under a construction contract.

A recent case in the Supreme Court of Victoria has demonstrated that adjudication determinations are often made by adjudicators who are not legally trained, and requiring a legal analysis at every point of an adjudication would result in an expensive and time–consuming process—the exact opposite of what the *Building and Construction Industry Security Payment Act 2002* (Vic) (SOP Act) intends to do.

This article looks at the court's decision in *Argyle Building Services Pty Ltd v Dalanex Pty Ltd (No 2)* VSC 452, in which the judge highlights:

(1) In circumstances where a construction contract fails to provide express provisions to calculate a reference date, or where there are express provisions but these are conflicting, section 9(2)(b) of the SOP Act will apply. It is not for an adjudicator to find and construe implied terms in a construction contract where these terms are either non–existent or conflicting.

(2) Absent agreement between the parties, section 14 of the SOP Act does not allow unilateral withdrawal or abandonment of a payment claim and resubmission of a fresh claim for the same reference date. Any resubmission of a new claim without consent of the other party will result in the resubmission becoming a nullity.

(3) A flexible approach is to be adopted when determining how an adjudicator is to 'set out' its reasons under section 21(2B)(a) of the SOP Act. An adjudicator is not required to identify its reasons with judicial levels of specificity. This would cause too great a burden and is inconsistent with the purposes of the SOP Act.

(4) Whether submissions are 'duly made' by a party is a matter for an adjudicator during the relevant adjudication and not for the court. A mistake in an adjudicator's decision under a specific source of its power will not necessarily result in a jurisdictional error where an alternative source of power can be found to support the decision.

We examine these points below.

GROUND 1(A) AND 1(B)—REFERENCE DATES AND MULTIPLE PROGRESS CLAIMS

GROUND 1(A)—CALCULATION OF REFERENCE DATES

There are two provisions in the SOP Act that can be used to determine a reference date:

- section 9(2)(a)—where the contract itself specifies a reference date (or a manner of determining such a date), then that date shall be the reference date for the purposes of the SOP Act; and
- section 9(2)(b)—if the contract does not provide an express provision, then the date occurring 20 business days after the previous reference date or (in the case of the first reference date) the date occurring 20 business days after when the construction work was first carried out under the contract or when goods and services were first supplied.

In this case, the contract provided for two reference dates, one in the formal instrument of agreement and one in the scope of works.

Argyle Building Services Pty Ltd (Argyle) submitted that the adjudicator should have assessed the reference date using section 9(2)(a) and not section 9(2)(b) of the SOP Act, as the reference dates were able to be determined

from the contractual documents. In failing to do so, the adjudicator committed a jurisdictional error.

The important consideration for the court was that the contract failed to indicate a hierarchy for interpreting the contractual documents. As a result, Justice Delany ruled that the two express terms in the contract were inconsistent, and it was open to the adjudicator to use the method in section 9(2)(b) when interpreting the reference dates.

The court also noted that section 9(2) should be read as a whole when determining how the section operates. Section 9(2)(b) uses the wording 'where there is no express provision', confining the operation of section 9(2)(a) to where there is an express provision and not where an implied reference date may be found.

Justice Delany noted that it was unnecessary to alter the language of the construction contract to find a reference date when section 9(2)(b) was available to fill the void in these cases.

GROUND 1(B)—MULTIPLE PROGRESS PAYMENTS

The subcontractor Dalanex Pty Ltd (Dalanex) submitted a progress payment claim to Argyle on 21 June 2021 for payment of claim 8. Argyle responded to this claim noting that Dalanex had failed to provide proper information surrounding its claim and rejected payment. Dalanex then notified Argyle that it withdrew claim 8 and several weeks later resubmitted a new claim 8.1 for the same reference date.

The court found that Dalanex did not serve multiple payment claims under the same reference date because claim 8 could not be unilaterally withdrawn under section 14(8) of the SOP Act. Claim 8.1 submitted by Dalanex was therefore a nullity, and claim 8 stood as Dalanex's claim for the month of June.

GROUND 2—TAKING INTO ACCOUNT SUBMISSIONS THAT WERE NOT 'DULY MADE' UNDER SECTION 23(2)(C) OF THE SOP ACT

Argyle submitted that Dalanex did not have a formal right to make submissions and, as a result, were not 'duly made' because the adjudicator's notice requesting the submissions was issued in contravention of section 21(2B) of the SOP Act.

Justice Delany held that the requirement for an adjudicator to 'set out' certain reasons under section 21(2B) can be satisfied in a number of ways, including providing a detailed explanation in the notice itself, or by 'setting out' information contained in documents incorporated into the notice by reference. Section 21(2B) must be interpreted in a practical and common sense manner, consistent with the language and purpose of the SOP Act as a whole.

The court therefore held that because the section 21(2B) notice was valid, the submissions received by Dalanex were 'duly made' for the purposes of section 23(2)(c).

While the court acknowledged that it was for an adjudicator to consider whether submissions by a party were 'duly made', it held that even if the adjudicator's section 21(2B) notice did not have a proper foundation, another part of the SOP Act provided for a separate head of power. In this case, it was section 21(2B) that allowed the adjudicator to request further written submissions from either party and a further right of reply to comment on those submissions.

As Argyle failed to convince the court on the above grounds, its application to quash the adjudication determination was rejected.

KEY TAKEAWAYS

(1) The purpose of the SOP Act is to provide an effective dispute resolution process, one that is free from excessive formality and does not require an adjudicator to re–write a construction contract or concern itself with complex legal arguments.

(2) Parties should ensure that there are express provisions dealing with reference dates in their construction contracts and that these are consistent with one another (in instances where there are multiple clauses dealing with reference dates). Further, a clause needs to be included in a construction contract to determine a hierarchy when interpreting contractual documents.

Kyle Siebel and Nicola Voss' article was previously published on the Holding Redlich web site—September 2022. Published with permission.

THREE WAYS TO AVOID CONSTRUCTION PROJECT DISPUTES

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INTRODUCTION

Infrastructure costs are soaring, and avoiding contract disputes is crucial in containing them. Many of the issues are entirely foreseeable.

Many major Australian infrastructure projects have been in dispute at one time or another. Big infrastructure projects are facing significant rising costs, and disputes are a significant, and often frustrating, component of these. A recent study[1] shows an average of 2.6 per cent of project costs is spent on construction project disputes. With Australian governments due to spend $248 billion in the four years to FY2024–2025[2] on construction projects, dispute costs alone could account for $6.45 billion. The impact of disputes on government and private sector balance sheets far exceeds the immediate dispute–related costs.

While the nub of the issue is the size and complexity of these projects—something that won't significantly change under the new government—the majority of the issues that lead to disputes are foreseeable. Because contractors are struggling with competitive pressures, resourcing problems and supply chain constraints, they face significant pressure during negotiations to remain price competitive. Tenders may be awarded for an unrealistic price because of insufficient budget allocation, or price pressure and competition during procurement.

When contractors begin work with a price they are already uncomfortable with, disputes inevitably arise during the delivery phase and frequently towards the end of the project.

Against this backdrop, how should parties entering into project contracts go about addressing these concerns to ensure they keep contract delivery teams focused on delivery, not disputes?

We've identified three key ways you can avoid costly disputes.

BE REALISTIC ABOUT COST

The procurement stage is a vital opportunity to take proactive steps that minimise issues later on. A key concern here is traditional contract risk allocation, which typically emphasises a lump sum price where risk is borne by the contractor. This can result in contractors bringing claims to make up the difference between the lump sum price and actual costs.

Parties should be careful to negotiate a realistic contract price at the start of a project. As part of this, principals should allocate an appropriate budget. This means considering factors that may extend costs beyond the tendered price, in order to estimate the project's likely 'ultimate cost', such as the possibility of encountering adverse site conditions, supply chain disruption, or potential changes in the principal's requirements.

In a competitive bid process, principals should properly compensate bidders for their bid costs. This ensures that contractors dedicate the time and effort to proper scoping and design, and that the proposed price accurately reflects the required scope for the project. Payment of bid costs is increasingly prevalent in government infrastructure projects, and we expect that reimbursement of unsuccessful bidders as a component of project budgets will continue to be seen as a constructive investment by principals.

Collaboration from the outset goes a long way to building effective, cooperative relationships that last the life of the project. Being a little generous early on can help principals avoid greater problems towards the end.

Taking this step also creates a culture of open, constructive communication around costs and claims. Both parties should be able to see how costs for each side might be shifting throughout the process, rather than being confronted with a large gap at project's end.

Conversely, we've seen time and time again erosion of trust at this stage translate to issues down the road. The investment of time and money associated with a highly collaborative and open bid process is, in our view, a useful allocation of project costs.

ENGAGE THE DELIVERY TEAM

There is often a disconnect, in both understanding and communication, between contract negotiators and the project delivery team. It is important that the delivery team is engaged throughout the procurement process, to ensure everyone is on the same page, and that negotiations reflect what the contractor can realistically deliver.

If not involved during negotiations, the delivery team must be brought up to speed upon contract award. There should be a dedicated early handover period, during which the commercial, technical and legal members of the deal team work closely with the delivery team to ensure everyone is aware of project obligations, timeframes, and who is responsible for each aspect of the project and contract. Preparing for the transition from contract negotiation to administration in this way can help reduce the likelihood of disputes arising.

Organisationally, a clear line of communication needs to be maintained between the on–site project team and those making the ultimate decisions. This communication often falls by the wayside as the on–site team deals with the day–to–day exigencies of project delivery—regularly scheduled check–ins between the site team and head office are important in ensuring contentious issues are being dealt with and escalated in a timely manner.

ADDRESS SPECIFIC RISKS

Construction projects often come with a set of 'known unknown' high–risk areas, such as sub–surface conditions, inclement weather, and interfaces with surrounding works or infrastructure. Despite being easily anticipated, these risks often end up becoming the focus of project disputes.

If the focus of a procurement process is to compel contractors to assume all 'known unknown' risk, it may be that principals achieve a short–term gain for long–term pain. We are seeing increasing evidence of principals being prepared to disrupt traditional risk allocation approaches by retaining or sharing risks that would typically be borne by the contractor.

While this may, of course, result in additional cost being incurred by the principal if a relevant risk materialises, it may also reduce the likelihood of claims being made by the contractor during project delivery. Achieving the right balance is difficult, but it is worth having these hard discussions during the procurement process.

There is scope to address these areas flexibly and creatively. Risks can be shared within the framework of a design and construct contract, or principals can choose to adopt different delivery models such as an incentivised target cost or alliance contract. These forms of contract are becoming more widely used, as parties acknowledge that a sophisticated and bespoke allocation of high–impact risks can be mutually beneficial.

Dealing with risk in this more nuanced way can be more time–consuming than under traditional contracts, but doing so can deliver significant returns by avoiding future dispute costs.

It is incumbent upon all market participants to engage flexibly, creatively and transparently when considering project delivery models and the treatment of key risks. Organisations must develop the skills, capacity and resolve to mitigate risks from the outset of a project and manage disputes to minimise costs to all parties.

By being more proactive and collaborative throughout the negotiation, procurement and delivery process, organisations will be better equipped to avoid or minimise the potentially exorbitant costs of protracted project disputes.

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Nick Rudge, Kip Fitzsimon, Michael Hogan and Joseph O'Shea's article was previously published on the Allens Linklaters web site—July 2022. Published with permission.

ISSUE ESTOPPEL DECONTEXTUALISED—THE RISE AND DEMISE OF ISSUE ESTOPPEL IN SECURITY OF PAYMENT

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The application of issue estoppel in the context of adjudications under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (the Act) is an area of law that continues to develop.

The statute has not changed in any material respect. Instead, it has been overshowed, some might say overwhelmed by 'judicial guidance'.

Issue estoppel has been perceived to be a concern in adjudication determinations and in the enforcement of statutory debts under the Act, in the absence of a determination.

Issue estoppel is a common law principle that can prevent previously determined issues being re–agitated. It has its basis in the principle of finality that is: once controversies have been judicially resolved they are not to be reopened except in limited circumstances. The justification is to ensure that litigants are not vexed in the same matter twice. It is intended to safeguard the administration of justice by conserving the court's finite resources and minimising the potential of inconsistent judgments.

The process of surveying judicial guidance as to the application of issue estoppel, if any, in the context of the Act usually starts with Macfarlan JA's judgment in the Court of Appeal decision in *Dualcorp Pty Ltd v Remo Constructions Pty Ltd* [2009] NSWCA 69 (*Dualcorp*):

I consider that the Act when read as whole manifests some intention to preclude re–agitation of the same issues. Thus, if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be re–opened upon a subsequent adjudication. Likewise, if no subsequent adjudication occurs but a claimant proceeds (as here) to seek judgment following upon the failure of the other party to serve a payment schedule the claimant should be denied judgment to the extent that what it seeks is inconsistent with the findings of an adjudicator.

The legal maxim of 'if it looks like a duck, swims like a duck, and quacks like a duck, then it probably is a duck' has been applied in subsequent decisions to assert that this represented the application of issue estoppel by Macfarlan JA, with whom Handley AJA agreed.

Allsop P in *Dualcorp* did not go as far, simply stating:

The Act was not intended to permit a repetitious use of adjudication process to require an adjudicator or successive adjudicators to execute the same statutory task in respect of the same claim on successive occasions. A party in the position of the applicant (Dualcorp), here, should not be able to re–ignite the adjudication process at will in order to have a second or third go at the process provided by the Act clearly because it is dissatisfied with the result of the first adjudication.

That seems to me to be describing abuse of process, not issue estoppel.

The majority position in support of the application of issue estoppel seems not particularly strong. The question arises, if Macfarlan JA did in fact determine to tip the baby out with the bath water?

Some say, including the Australian Capital Territory Court of Appeal that, although the outcome of *Dualcorp* was the right one, the reasoning went too far. Macfarlan JA's position that, if questions of entitlement have been resolved by an adjudication determination, those findings may not in my view be re–opened upon a subsequent adjudication has been followed

and applied in single judge decisions in New South Wales, Queensland, Tasmania and Western Australia.

In *Icon Co (NSW) Pty Ltd v AMA Glass Facades Pty Ltd* [2009] NSWSC 250, Stephenson J suggested that the Act requires adjudicators to follow the contractual interpretation adopted by earlier adjudicators in respect of subsequent claims arising from clauses that have been previously interpreted, even if such interpretation was erroneous.

In *Watpac Constructions v Austin Corp* [2010] NSWSC 347 McDougall J estoppel's reach was held to extend to Anshun estoppel. That is principles of issue estoppel apply not only to issues actually raised and necessarily decided but also to issues that could (and perhaps should) have been raised but were not.

Issue estoppel had, in New South Wales at least, reached the high water mark. To some it seemed a storm surge.

But alas, in other jurisdictions the courts are not so convinced. Single judges in Queensland and South Australia have held that for this common law doctrine to apply it must be found in the Act itself. The seeds of doubt were sown and issue estoppel's application both in terms of its appropriateness and extent is far from uniform around Australia.

Cue the Court of Appeal in the Australian Capital Territory in the case of *Harlech Enterprises Pty Ltd v Beno Excavations Pty Ltd* [2022] ACTCA 42, handed down 11 August 2022 (*Harlec v Beno*). By way of background, the claimant provided building advice to the respondent. The claimant made a payment claim.

The respondent issued a payment schedule asserting:

- no construction contract;
- no agreement to pay by instalments;
- the SoP Act did not apply to agreement between the parties;
- the claimant had been paid; and
- the figures claimed are incorrect [if the Act did apply].

The payment claim went to adjudication and the claimant was 100 per cent successful.

Further payment claims were issued by the claimant. In response the respondent repeated the contentions it made in the already adjudicated payment schedule and which had been decided by the previous adjudicator.

The adjudicator in the subsequent adjudication determined that all but one of the grounds were the same grounds determined in the previous adjudication application and so the principle of 'issue estoppel' applied. So, the claimant won, again.

The respondent took the determination to the Supreme Court of the Australian Capital Territory for the Australian Capital Territory equivalent of judicial review on the basis that the adjudicator erred in not reconsidering the six grounds previously determined on the basis of issue estoppel.

The court at first instance (Mossop J for the trainspotters) accepted that the respondent was correct and set aside the determinations. So, the trial judge found that issue estoppel did not apply in the context of adjudications under the Act.

The claimant appealed to the Australian Capital Territory Court of Appeal, and the appeal was dismissed with costs by way of an interesting combination of judgments. All three judges found in favour of the respondent, but two slightly different approaches were applied. Houston, we have a plurality!

Kennett J identified that an adjudication decision does not affect any right that a party may have to a progress payment under the Act and so a right to a progress payment is not affected by a previous adjudication, other than in the manner identified by Allsop P in *Dualcorp*.

He found that this position is provided for under section 38(1)(b) of the Australian Capital Territory Act being precisely the same wording as section 32 of the New South Wales Act which provides:

32. Effect of Part of Civil Proceedings [NSW]

(1) Subject to section 34, nothing in this Part affects any right that a party to a construction contract –

(a) may have under the contract, or

(b) may have under Part 2 in respect of the contract, or

(c) may have a part from this Act in respect of anything done or omitted to be done under the contract.

(2) nothing done under or for the purpose of this Part affects any civil proceedings arising under a construction contract, whether under this Part or otherwise, except as provided by subsection (3).

Kennett J's judgment turned on this: the fact that section 38(1)(b) (or section 32(1)(b)) of the New South Wales Act provides that nothing in Part 3 (or Part 4 in New South Wales), which includes the provisions for an adjudication, affects any rights a person may have under Part 3, which is the right to make payment claims and have them determined under the Act.

Accordingly, his Honour found that an adjudication decision does not affect any right that a party may have to a progress payment

Issue estoppel is a common law principle that can prevent previously determined issues being re–agitated ... It is intended to safeguard the administration of justice by conserving the court's finite resources and minimising the potential of inconsistent judgments.

under the SoP Act. His Honour held there was no room left for the operation of common law issue estoppel in an adjudication in respect of issues decided in a prior adjudication.

This he observed is supported by:

• the adjudication process being so different to the kind of hearing that parties would expect to have if they are to be bound by the decision–maker's conclusions on all essential matters, given:

• the very short time frames;

• the strictly defined body of documentary material despite claims often being extremely complex and involving substantial quantities of documents; and

• questions of interpretation of the contract [and jurisdiction] often arising, yet the adjudicator not being required to be legally qualified.

All of those are inconsistent with the decision being 'final' in the sense that would attract issue estoppel at common law.

There are therefore two pillars supporting this conclusion, section 24(4) (or section 22(4) of the New South Wales Act) and the 'rough and ready' adjudication regime being inimical to assumptions behind the application of 'issue estoppel'.

Finally, Kennett J stated that to the extent that the majority in *Dualcorp* saw the result in that case flowing from issue estoppel (if that was in fact what it did), he respectfully disagreed with the majority.

In Kennedy J's view, *Dualcorp* does not resolve the issue other than in respect of the situation where materially the same claim is submitted for adjudication repetitiously.

Lee J after considering the Act and its processes turned to the application of issue estoppel in that context, which he referred to as 'preclusion'. He noted that the preclusion can only arise with respect to issues that a court or tribunal has actually addressed [query whether this is correct given the wildcard of Anshun estoppel] and determined and only if the issues were essential to the disposition of the cause in question. It is also apparent that it only arises in relation to a 'final and conclusive decision on the merits'.

Lee J noted Macfarlan JA's finding in *Dualcorp* that an adjudication determination is 'final and binding between the parties as to the issues determined', and that on that basis 'principles of issue estoppel' were applicable. Lee J, however, also noted that Allsop P in *Dualcorp* didn't find it necessary to apply principles of estoppel and that the provisions of the New South Wales Act provided a sufficient barrier to the mischief identified.

For example, section 13(5) which limits a claimant to one payment claim in respect of each reference date, the absence of any entitlement under the old New South Wales Act permitting a party to create fresh reference dates by lodging the same claim for the same completed works in successive payment claims.

Lee J reviewed decisions in respect of the application of issue estoppel in the context of adjudication determinations since Dualcorp in New South Wales, Tasmania, Western Australia, South Australia and Queensland and identified support for the view that if issue estoppel did apply, then it was quite limited, and its source must be found from within the Act rather than issue estoppel as it applies curial or court action.

Lee J was concerned by the danger of decontextualising the 'principles of issue estoppel beyond their principled application'. This led him to the conclusion that the species of

preclusion referred to as issue estoppel in the SoP context is best described as abuse of process. This follows from a consideration of numerous exclusions within the SoP Act such as:

(1) the limits upon the number payment claims that can be brought in any month;

(2) requirement that a payment claim must include work performed within a given period prior to the payment claim;

(3) the mandate that if an adjudicator has valued construction work that a subsequent adjudicator is bound by that valuation in a later adjudication; and

(4) limitations upon enforcing judgment debts based upon adjudication certificates, for example, court cannot enforce a judgment for the same debt more than once.

His Honour concluded that common law principals, such as 'issue estoppel' are only entitled to operate to compliment Acts of Parliament, not overwhelm them. Like Kennedy CJ, Lee J found that the source of any preclusion must be the Act itself, not the common law principle. Applying those findings, Lee J noted that the two adjudications concern different work completed years apart and on that basis there was no precluded re–agitation or attempt to value the same work a new.

Lee J stated that he was unable to agree with the proposition that parties are precluded from re–agitating facts 'fundamental to the decision arrived at' or 'legally indispensable' to the ultimate conclusion.

Further, one needs to have regard to the exclusive list of mandatory considerations of the matters which an adjudicator can consider in making a determination. These are both set out in the Act and include the jurisdictional matters to be determined by each adjudicator to provide a valid adjudication determination. If an adjudicator is bound to a previous determination as to matters such as:

- the existence of a contract;
- construction of a contract; and
- the agreed rate of payment under the contract,

they are unable to turn their mind to the matters the Act requires them to consider.

Lee J concluded that issue estoppel in its common law sense did not apply. He held that the respondent should not have been shut out of its grounds in its payment schedule and the subsequent determination could not stand.

So, Lee J also finds that the only preclusions are the variety Allsop P identified in *Dualcorp*, i.e. repeated claims and also other forms of abuse of process the source of which are found within the Act. Justice Jeffrey Kennett, however, observed that nothing in the Act suggests that a decision on an adjudication determination is intended to be conclusive of rights under the contract. Indeed, quite the contrary. The extent to which the determination is final is circumscribed. It is interim and does not prevent any arguments being put in subsequent proceedings (including adjudications).

The third judge in the Australian Capital Territory Court of Appeal was Elkaim J. He also dismissed the appeal, in another short judgment finding:

… without rejecting the path taken by Kennett J, I prefer that taken by Lee J.

and indicated his approval of the logic that common law principles operate to complement the Acts of Parliament, not to overwhelm them. The storm surge abates.

Dualcorp's position as the foundation stone for the application of issue estoppel seems quite eroded by the Australian Capital Territory Court of Appeal in *Harlec v Beno* as is the status of the many single court judgments that have followed Macfarlan JA's approach. I expect it will temper the application of issue estoppel by adjudicators and will be the subject of practical, academic and judicial discussion for some time yet.

You'll be excited as I am to learn that this journey is not over. The Australian Capital Territory Court of Appeal decision in *Harlec v Beno* is, as at 20 October 2022, the subject of a special leave application to the High Court. Perhaps the relevance of issue estoppel will soon be resolved in a manner that provides clarity and consistency around the Commonwealth.

And here's hoping the parties don't settle!

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DEFECTS, EXPERTS AND MAINTAINING PRIVILEGE—THE IMPORTANCE OF ENGAGING EARLY

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INTRODUCTION

During or after a construction project, it can become apparent that there is a defect in the works. In circumstances where the cause or impact of the defect is unclear, it may be necessary to engage an expert to investigate.

In this article, we discuss the importance of dealing with defects soon after they are discovered, when to engage an expert, and how to maintain privilege over your communications with your chosen expert.

WHY SHOULD YOU ENGAGE WITH A POTENTIAL DEFECT EARLY?

It seems like common sense, but the sooner a defect is identified, the sooner and likely cheaper it can be fixed. Defects left unattended can cause significant damage. Depending on the defect, if left alone, it can increase the eventual rectification costs and/or significantly reduce the value of the property. Further, if you have a right to claim on your insurance, confronting the defect early can help ensure the success of your claim.

Besides insurance claim issues, commencing investigations early will also help ensure that you don't risk losing your right to seek compensation if the defect amounts to or was caused by a breach of contract or someone's negligence. In Queensland, a cause of action for breach of contract or for negligence must be commenced within six years of the cause of action accruing, according to the *Limitation of Actions Act 1974* (Qld). This limitation period will be longer if the claims relate to personal injuries or death as a result of the defect.

A cause of action for a breach of contract accrues on the date of the breach, while a cause of action for negligence accrues on the date the loss is suffered. If the defect was latent for some time, the cause of action for negligence may accrue years after the construction work was completed.[1]

All of Australia's states and territories have similar limitation periods. However, in the building industry, there are additional limitations in most jurisdictions, these are referred to as 'long stop' limitation periods. A long stop limitation period essentially prevents proceedings from being commenced more than 10 years after the building works in question were completed or the date the occupancy certificate was granted (depending on the jurisdiction). This can reduce the time within which you must commence proceedings. For instance, if a defect has been latent and only manifests and causes you loss nine years after the building work was completed and/or the occupancy certificate was issued, you will only have one year to commence proceedings for a civil action for loss or damage arising out of or in connection with defective building work.

The long stop limitation periods are not found in the usual *Limitations of Actions Acts* in each state and territory. Instead, the long stop limitation periods sit within building–specific legislation.[2]

In Queensland and Western Australia, there is no statutory long stop limitation period.

In summary, if the cause and extent of a defect is unclear and if it is not investigated early, there is a risk that you may not have sufficient information to commence your legal action within the limitation period. Matters to keep in mind are that you will have an obligation to identify every potential defendant under the *Civil Liability Act 2003* (Qld)[3] and the expiry of the limitation period may prevent you from amending, or limit how you may amend, your legal case after you have finalised your investigations of the cause and extent of the defect.

ENGAGING YOUR EXPERT

Experts may be necessary to determine:

(1) the cause of the defect;

(2) the extent and effect of the defect; and

(3) the method and cost to rectify the defect.

More than one expert may be required depending on the defect. For instance, one or more experts who specialise in the type of defect may be required, and another who can complete a quantum assessment of the cost to rectify the defect.

It is important to ensure that your experts are suitably qualified to provide an opinion about the defect. For example, if the defect is cracked concrete and there is a question about the concrete mix, you may be best placed to find a concrete scientist who understands the importance of heat and mix ratios. It may also be necessary to engage a structural engineer who can then apply the findings of the concrete scientist to the question of the structural integrity of the building or structure and the necessary rectification.

The expert engagement process can be lengthy if it is difficult to find the expertise necessary to investigate the defect. This may require searching further afield than Australia, which can bring its own difficulties with time zones.

Finally, if you intend to rely on your expert to support your legal case, it is worth investing early in an independent expert who will have more credibility than a consultant involved in the original construction work.

MAINTAINING PRIVILEGE

It is often practical to instruct your solicitors to engage your expert on your behalf, be the conduit for any written communication between you and your expert, and conduct the matter in such a way that privilege will apply to the extent it lawfully can.

If expert opinion is being sought to assist you settle a dispute, it and any communications relating to it may be subject to 'without prejudice' privilege, which exists to protect parties who are willing to negotiate. The principle effectively protects the documents that are brought into existence for settling a dispute and prevents them from being relied upon by the other party to your detriment. This is especially important if those documents appear to admit something you wouldn't have admitted but for the potential of reaching a resolution. Therefore, all documents should be marked as 'without prejudice' where possible.

If you obtain an expert report for use in a settlement negotiation, it is generally considered to be 'without prejudice' and is not disclosable outside of that setting. However, to claim that a document should not be disclosed or cannot be provided outside of the settlement setting, you must be able to show that there was a proper connection between the expert report and it being produced for settlement.

If litigation is anticipated and you have instructed a solicitor to act on your behalf, communications with experts can be subject to legal professional privilege. This requires that the communication is confidential and has been made for the dominant purpose of being used in aid of, or obtaining legal advice about, actual or anticipated litigation.

However, when an expert report is finalised and exchanged between the parties, any privileged documents relied upon by the expert in preparing the report are no longer privileged. This will generally include the instruction letter or brief sent by your solicitor to the expert.

However, documents that are created by experts throughout the course of preparing their final expert report can be deemed to be outside of this litigation privilege and potentially disclosable. Unlike other Australian jurisdictions, in Queensland, a document consisting of a statement or report of an expert is not privileged from disclosure.

To minimise your disclosure obligations, you could:

(1) request the expert not to prepare any working documents, including draft reports; and

(2) if a draft report must be prepared, ensure that this is issued to your solicitor only and exclusively for a review to provide you advice.

Further, to help maintain privilege, it is strongly advisable that every piece of correspondence sent to the expert is labelled as confidential and privileged. If a document is not treated as confidential and privileged, privilege will likely be waived.

CONCLUSION

Confronting defects early is an important consideration for those in the construction industry. Where necessary, engaging the right expert is essential, as is ensuring your position is not compromised throughout the expert process.

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3. As discussed in our previous article, see above n 1.

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CONTRACTING FOR THE CLIMATE IN INFRASTRUCTURE AND CONSTRUCTION

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KEY TAKEOUTS

Climate–aligned contracting is a practical tool to allocate the accelerating and dynamic risks (and opportunities) associated with climate change.

Key drivers for addressing climate in your contracts include the elevated expectations for organisations to set and meet ambitious emission reductions targets and the increased demand for 'green' investments by ESG (Environmental, Social, and Governance) aware investors.

Globally, organisations are embedding climate solutions into commercial arrangements and using contractual drafting to deliver net zero targets today.

INTRODUCTION

So, you've set a net zero target (or your client has!) … now what? How can your organisation take demonstrable steps to deliver to these net zero commitments?

Your contracts may be the key.

Embedding climate objectives into procurement and counterparty arrangements has transitioned from a ‘sleeper issue’ to a key lever in the transition to a net zero economy. Governments and organisations have for some time focussed on setting net zero targets and establishing policy frameworks to deliver to these commitments. Now, however, they are turning to contracting as a practical tool to implement their commitments.

There is increasing financial value at risk due to the impacts of climate change. Emissions reduction in particular is an entire value chain proposition—and in the construction[1] industry, a significant portion of those emissions are scope 3 emissions[2] and outside business fence lines. Contracting is one of the few mechanisms within a party’s sphere of influence to manage their scope 3 emissions and protect their organisation from the risks of climate change, in a forward–looking way.

Climate change is a dynamic issue that principals and contractors have the opportunity to mitigate and manage the impact of through their contractual arrangements. In this article, we unpack what 'climate–aligned contracting' is for the infrastructure and construction industries, the drivers for addressing climate risks (and opportunities) in contracts and highlight some climate clauses to start using in your contracts today.

WHAT IS CLIMATE–ALIGNED CONTRACTING?

Addressing climate change risks and opportunities in contractual frameworks goes beyond including obligations to meet 'green' or sustainable design/as–built standards or construction practices (such as the Infrastructure Sustainability Council Rating Scheme[3] or Green Star[4]).

Climate–aligned contracting involves drafting contractual provisions (or levers) to allocate and to deal with both the specific climate related risks—namely physical risks and economic transition risks—and the opportunities associated with climate change in the global transition to net zero.

Physical risks are both the acute risks associated with an increase in the frequency and intensity of extreme weather events. This includes coastal and inland floods, bushfires, extreme winds and heatwaves, and gradual onset impacts such as sea level rise, increasing average temperatures and rainfall variation. They need to be factored into how infrastructure projects are delivered in the short–term and maintained over decades.

Economic transition risks are the responses of governments, capital markets and consumers as the real economy transitions toward net zero emissions.

Economic transition risks include policy and regulatory responses (such as emissions reduction laws, heightened planning and building codes and prudential regulation), technological developments (in areas such as renewable energy and electric vehicles) and shifts in stakeholder preferences (including of debt and equity investors, insurers, users of infrastructure and the community).

Climate–aligned contracting is rapidly becoming (if not already) an essential requirement for both long term infrastructure projects and short to medium term 'standard' construction contracts. Physical risks, in particular, continue to accelerate and increase exponentially with longer project timelines and asset lifespan. The earlier that these issues can be planned for—during the planning, design and procurement stages—the greater the opportunity to address and manage climate change risk during the project lifecycle. In adopting this early

stage intervention approach and including climate–aligned contracting in contractual arrangements now, contracting parties will not be left playing 'catch up' to develop and implement solutions as climate risks materialise.

Climate–aligned contracting is also a mechanism for capturing the opportunities posed by climate change today. Principals and contractors alike can use their counterparty arrangements to deliver to net zero commitments, and to capitalise on the parties' climate credentials (e.g. by aligning the terms of green financing with low carbon or net zero project delivery metrics).[5]

DRIVERS FOR INCLUDING CLIMATE DRAFTING IN INFRASTRUCTURE AND CONSTRUCTION CONTRACTS

Why are infrastructure and construction players turning to contracts to deliver net zero in project delivery? The drivers of change can be summarised over three key themes. The defining and common characteristic of these shifts is the speed in which the changes are occurring.

ACCELERATION OF EMISSIONS REDUCTION WITH HEIGHTENED FOCUS ON 2030 TARGETS

The release of the updated consensus science on the state of the climate, IPCC's Sixth Assessment Report (AR6) in August 2021 has further clarified the understanding of the impacts of human–induced climate change.

AR6 has illuminated the need for immediate and rapid emissions reduction in order to meet the Paris Agreement goals. Specifically, this means a global reduction of carbon emissions by at least 45 per cent by 2030 compared to 2010 levels.

Setting a 2050 net zero target is now a 'ticket to play'—with the focus shifting to interim emissions reduction targets to 2030. In 2022, that focus is now on the 'how' of getting to net zero—with contracts as a key lever in the implementation of organisational emissions reduction plans.

EARLY MOVER GOVERNMENTS ARE LOOKING TO INFRASTRUCTURE TO PURSUE THEIR CLIMATE AND EMISSIONS REDUCTION POLICIES

Governments with ambitious climate policies (such as the European Union and United Kingdom) are moving beyond target setting to implementation of their transition plans. Infrastructure and public procurement is a focus area for these governments, as there is large scope for emission reductions given the significant contribution of transport and buildings to global emissions. We can look to these first mover jurisdictions to understand what is in the pipeline for Australian projects.

For example, a number of United Kingdom and European Union climate specific public procurement and infrastructure policies were released in 2021 and early 2022. These frameworks raise the bar on climate mitigation and resilience in the delivery of infrastructure assets/public procurement; shaping best practice and contracting methods for climate–proof infrastructure. For example, the United Kingdom Government[6] requires bidding suppliers on projects over £5 million to have a Carbon Reduction Plan setting out the supplier's commitment to achieving net zero by 2050 in the United Kingdom. They also need to set out the environmental management measures that they have in place, which will be in effect and utilised during the performance of the contract.

See also, for example, the European Commission Technical Guidance on the climate proofing of infrastructure in the period 2021–2027 (2021/C 373/01)[7] and European Union Taxonomy for Sustainable Activities—Regulation 2020/852.[8]

DEBT AND EQUITY INVESTORS ARE SEEKING 'GREEN' INVESTMENTS TO MEET INCREASINGLY AMBITIOUS ESG MANDATES

Over 90 per cent of global GDP (and 83 per cent of all greenhouse gases) is now subject to a national net zero target.[9] There are over $10.6 USD trillion in assets under management globally covered by a net zero commitment under the UN–convened Net Zero Asset Owners Alliance.[10] All five big banks in Australia have joined up the UN–convened Net Zero Banking Alliance,[11] committing to align their lending and investment portfolios with a Paris Agreement–aligned pathway to net zero by 2050.

ESG aware investors are now seeking investments for their 'green' capital—including 'green' or 'net zero aligned' infrastructure projects. This is driving the uptake of green–labelled financial products to incentivise project proponents to meet and beat 'green' project metrics, such as carbon reduction targets for project delivery (e.g. through design, material procurement and construction methodology). This trend is informing future contracting methods, particularly as principals seek to ensure that there are sufficient contractual enforcement mechanisms in place to ensure the 'green' objectives are met on completion and throughout the asset's useful life.

Contracting is one of the few mechanisms within a party's sphere of influence to manage their scope 3 emissions and protect their organisation from the risks of climate change, in a forward–looking way.

CLIMATE CLAUSES FOR INFRASTRUCTURE AND CONSTRUCTION

Organisations around the world are embedding climate solutions into their commercial arrangements today. MinterEllison is a proud contributor to The Chancery Lane Project[12] ('TCLP'), a global legal initiative which produces precedent clauses to assist organisations in delivering net zero through contracts.

There is no 'one size fits all' for climate–aligned contracting, as every site, project and organisation has varied exposures to climate risks and opportunities. This means that careful consideration is required when incorporating climate–aligned clauses into commercial documents. Organisations need to consider the size and sophistication of counterparties and the counterparties' relative net zero ambitions, as well as the unique risk profile of the asset and site to both physical risks and economic transition risks. Like all precedent clauses, it is critical that these are appropriately adapted to suit the relevant commercial objectives and arrangements.

There are a number of TCLP clauses which can be used to deliver net zero in infrastructure assets today (each named by TCLP with child's name):

ROBYN'S QUESTIONNAIRE[13]

A self–assessment questionnaire for contractors, subcontractors and suppliers which can be used by principals and contractors during procurement as evaluation criteria for assessing a respondent's approach to climate risk and emissions reduction.

The questionnaire sets out questions in relation to climate risk management and the respondent's overall approach to emissions reduction, with guidance on what is considered high to low ambition across a range of criteria. The respondent is then required to self–assess against its existing climate and sustainability practices. If used during the RFP (request for proposal) phase, Robyn's Questionnaire can be used as part of tender evaluation criteria. The responses can also be revisited and updated periodically throughout the engagement and used to assess performance during the delivery phase against the climate risk criteria and progress toward achieving net zero targets.

LUNA'S CLAUSE[14]

A clause which provides a specific mechanism for contractors to propose sustainable net zero aligned modifications to the project works.

Luna's clause can be used to encourage contractors to propose and implement sustainable construction solutions during the delivery phase. Similar to traditional modification regimes in typical construction contracts, this clause is a contractual mechanism that is specifically directed to net zero aligned modifications. Contractors are encouraged to propose sustainability focused modifications, which, despite being likely to come at increase cost in the short term, have benefits for the principal (through reduced energy and operating costs and increased green financing opportunities), the project and the environment.

TRISTAN'S CLAUSE[15]

A clause which sets a 'carbon' budget for the materials procured for a construction project.

Tristan's clause can be used alongside the financial budget for the project to incentivise contractors to reduce the embodied carbon emissions across the project lifecycle. By including metrics for emissions reductions, the contractor is encouraged to make decisions

which reduce embodied carbon, which may not otherwise be made under traditional value for money assessments that do not take into account embodied carbon.

ROSE'S CLAUSE[16]

A clause which makes infrastructure or project finance conditional upon the principal or borrower developing and implementing a whole–of–life decarbonisation plan (which covers both the construction and operational phases).

Rose's clause can be built into finance documents to incentivise mitigatory behaviour regarding climate change and decarbonisation during the life of the project. It also provides contractual levers for lenders to activate in response to continued breach (e.g. failure to meet net zero standards).

OWEN'S CLAUSE[17]

A clause that passes through the principal's net zero targets and obligations through to its supply chain arrangements. The clause entitles the principal to offset the counterparty's carbon emissions where the net zero obligations are not achieved, or even terminate the contract.

Owen's clause can be used to enable principals to align net zero targets with their supply chain and contractors which contribute to the principal's own carbon emissions (e.g. such as the materials procured for a construction project which would be considered scope 3 emissions). Requiring ongoing emissions reporting against these targets also allows the principal to control or otherwise manage the achievement of their own net zero commitments.

TCLP has published a practical Net Zero Toolkit[18] containing climate–aligned contract clauses and tools to assist organisations to deliver to their net zero commitments through contracts.

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THE RESURRECTION OF RISE AND FALL MECHANISMS IN INFRASTRUCTURE CONTRACTS

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KEY ISSUES FOR CLIENTS AND CONTRACTORS

Against the backdrop of the war in Ukraine, ongoing supply chain challenges associated with COVID–19 and a red–hot infrastructure market, 2022 was the year that Australian contractors firmly rejected the traditional approach to input cost risk allocation.

For a generation, major infrastructure projects in Australia have not typically contained 'rise and fall' mechanisms. Contractors have borne the risk that their price will make sufficient allowance for escalation of input costs (e.g. materials and labour) during delivery of the project. However, this traditional approach is changing.

This article discusses the issues that are likely to be relevant to both clients and contractors in reaching a mutually acceptable risk allocation regarding input costs, and addresses three main areas:

(1) the changing position regarding input cost risk;

(2) key issues to consider in developing a rise and fall mechanism; and

(3) an example rise and fall mechanism.

THE CHANGING POSITION REGARDING INPUT COST RISK

In the two decades between 2000 and 2020, prices for materials and labour were relatively predictable.[1]

As a result of this relative price stability and a desire for cost certainty on the part of clients and their financiers, there was a developing expectation that contractors take (and price) the full risk of changes to input costs.[2] This approach was generally accepted by the contractor market and is consistent with the view that contractors (who control purchasing decisions) are better placed than clients to manage the risk of price escalations. As a result, rise and fall clauses became less prevalent in major project construction contracts.[3]

Recent disruptions to domestic and international markets, variously associated with COVID–19, the war in Ukraine and increased activity in the infrastructure sector, have resulted in significant fluctuation in the prices of power, fuel, bitumen, steel, copper and sea freight.

These challenges have broadly coincided with a movement by clients (particularly public clients procuring major infrastructure) towards contract models that share risks and promote collaborative behaviours—this movement is evident across sectors, delivery models and state borders.

The result is a market where the traditional risk allocation regarding input costs is not acceptable to:

- contractors, who are reluctant (and often unable) to assess the risk of price changes in a robust or reliable way in the context of current price volatility; or
- clients, who will likely be required to pay an unacceptable price for the transfer of escalation risk to contractors.

While it will be difficult for some clients to take unlimited risk of price fluctuations, especially in relation to projects that are financed on the basis of lump sum contracts or fixed 'rental' returns, there are opportunities to craft bespoke rise and fall mechanisms that reduce contractor risk in a manner that can be accommodated by clients and their financiers, especially if lump sum prices are reduced by significant amounts to reflect the sharing of escalation risk.

ISSUES TO CONSIDER IN DEVELOPING A RISE AND FALL MECHANISM

Clients have traditionally taken the view that contractors are better placed to assess and manage risks associated with price fluctuations. This is largely true, save for circumstances in which a client is supplying inputs. There are various recent examples in Australia of clients supplying proprietary equipment and various commodity items including fuel, aggregates, ballast, rails and sleepers.

By way of contrast, a contractor typically has control over purchasing decisions and, subject to contractual constraints associated with local industry participation, can generate and take advantage of competitive tension among suppliers to optimise price. If a contractor is also responsible for design, there may be opportunities for a contractor to 'design out' or minimise components that are at risk of material price increases. On longer–term projects, contractors can transfer risk to third parties, e.g. by effecting financial hedges or entering into forward contracts for a variety of inputs, including 'green' credits. Many multinational contractors achieve significant savings by establishing international purchasing hubs in low–taxation locations, exploiting purchasing power by pooling demand across multiple projects to secure volume discounts and investing in offshore manufacturing to take advantage of lower production costs.

However, in an environment characterised by rapid and pronounced price fluctuations, the contractor market will seek to share the risk of price increases.

Our recent experience suggests that the following matters should be discussed when negotiating a risk–sharing mechanism.

TRANSPARENCY AND COLLABORATION

Unless the procurement model involves an alliance or early involvement process, contractors may be reluctant to provide a client with a full breakdown of its tender price. It will be much easier for parties to negotiate a rise and fall mechanism if the contractor provides the client with information as to how it has calculated its base allowance for inputs proposed to be subject to the rise and fall mechanism, and the way it has priced the risk of cost fluctuations.

With this information to hand, a client will be able to readily compare potential reductions to the tender price against potential exposure under a rise and fall mechanism. Transparency is the basis for the parties being able to explore value for the client and risk mitigation for the contractor.

INPUTS

Clients may be reluctant to agree that the entire construction sum be subject to rise and fall, especially in circumstances in which the risk of price increases differs between inputs. Accordingly, a better approach may be for parties to identify the high cost / high volume inputs that are most at risk of price fluctuations and investigate opportunities for sharing of price risks associated with a limited number of inputs.

For example, the parties may agree that there is no need to accommodate changes to the price of copper in relation to a civil project that involves minimal mechanical and electrical work, despite there being a high risk that the price of copper may fluctuate dramatically within the contract term.

By contrast, fluctuations in the price of bitumen are highly relevant to civil projects that involve road surfacing works.

For a generation, major infrastructure projects in Australia have not typically contained 'rise and fall' mechanisms. Contractors have borne the risk that their price will make sufficient allowance for escalation of input costs (e.g. materials and labour) during delivery of the project. However, this traditional approach is changing.

RISK MANAGEMENT

Contractors have a range of options to manage the risk of price fluctuation and it is reasonable for clients to expect that contractors will remain incentivized to adopt best–practice procurement processes. This expectation is often reflected in a rise and fall mechanism by incorporating a 'collar' or 'trigger point' (which can be expressed as a percentage, volume or whole dollar value), below which the contractor takes risk of price increases and above which the client is on risk (or risk is shared). The rise and fall mechanism therefore addresses material, rather than 'business as usual', fluctuations.

RECIPROCITY

It is reasonable for a client to expect that, in return for it taking risk on material price increases, it should benefit from material price decreases. Under a reciprocal mechanism, the client may agree to take the benefit of price falls with a 'mirror image' collar or trigger point. For example, a client may agree to compensate a contractor for price increases exceeding 20 per cent of an agreed baseline, whereas the contractor will be exposed to a price reduction only if the price falls more than 20 per cent below the baseline.

ADMINISTRATION AND RECONCILIATION

Contractual payment schedules and constraints are usually designed to ensure that a contractor remains cashflow positive throughout the course of a project. If there is a risk that a contractor's cashflow positivity may be impacted by input price fluctuations, it may be sensible for the parties to undertake a price review on a monthly or quarterly basis. However, if cashflow positivity is unlikely to be a significant issue, parties may prefer to simplify administration by undertaking price reviews on an annual basis. As a general observation, if there is a reasonable prospect that prices may decline as well as increase during the course of a project, it may be sensible for parties to agree that prices will be reviewed at the completion of the project, or timed to coincide with the contractor's purchase of selected inputs.

PRICE CHANGE OBJECTIVITY

Parties will have most confidence in the integrity of a rise and fall mechanism if price changes are calculated by reference to an objective measure, such as an index or exchange–traded commodity. If this is not possible, for example if the selected input is not a commodity product, a client will normally require visibility of (and possibly audit rights in relation to) the contractor's procurement process and documentation.

PREVENTING UNINTENDED RISK TRANSFER

An effective rise and fall mechanism should ensure that it does not have the unintended consequence of transferring other risks from the contractor to the client. The parties should consider, for example, whether the client should bear escalation risk to the extent that the contractor has deviated from its procurement plan, is running late (i.e. materials are procured after the relevant date for completion), or ultimately procures a greater volume of the relevant input than was allowed for in its tender price.

EXAMPLE RISE AND FALL MECHANISM

We anticipate that the features of any rise and fall mechanism will require detailed and nuanced discussions between clients and contractors.

We suggest that the following mechanism may be a useful place to start these negotiations, noting that this mechanism will in large part address the issues identified above regardless of whether prices rise, fluctuate or fall over the course of a project.

*A **Periodic Assessment (Commodity)** will be calculated on each Assessment Date in accordance with the following formula:*

Periodic Assessment (Commodity) = (Indexed Price—Benchmark Price) x Commodity Amount (Periodic)

where:

- ***Assessment Date** means the last day of the quarter immediately following the contract date, and the last day of each quarter thereafter until the date for completion*
- ***Benchmark Index** means the value of [agreed commodity index] as at the contract date*
- ***Benchmark Price (Commodity)** means [agreed commodity price as at the contract date, per unit weight or volume)*
- ***Commodity Amount (Periodic)** means the amount of the commodity purchased by the contractor solely for the purposes of the works within the Period*
- ***Current Index** means the value of [agreed commodity index] as at the Assessment Date*
- ***Indexed Price (Commodity)** means the Benchmark Price (Commodity) x [Current Index / Benchmark Index]*
- ***Period** means the period between each Assessment Date and the immediately preceding Assessment Date or the contract date, as relevant*

Within one month of the date of completion, the contractor must submit to the principal a Final Assessment (Commodity),

being the sum of all Periodic Assessments (Commodity).

If the parties decide that neither party will have an entitlement to relief unless the total costs of the commodity rise above or fall below an agreed threshold (for example, 20 per cent), the following clause may facilitate the intended reconciliation:

If the Final Assessment (Commodity) is equal or greater than 120 per cent of the Contract Allowance (Commodity), the principal must pay the contractor an amount equal to:

Final Assessment (Commodity)—(Contract Allowance (Commodity) x 1.2)

If the Final Assessment (Commodity) is equal or less than 80 per cent of the Contract Allowance (Commodity), the contractor must pay the principal an amount equal to:

Final Assessment (Commodity)—(Contract Allowance (Commodity) x 0.8)

where:

- *Contract Allowance (Commodity) means an amount equal to the Commodity Amount (Final) multiplied by the Benchmark Price (Commodity)*
- *Commodity Amount (Final) means the sum of the Commodity Amounts (Periodic)*

If a client is seeking to ensure that its contractor consumes the commodity as efficiently as possible, the parties can agree that the Commodity Amount (Final) will not exceed an agreed amount, and that Periodic Assessments (Commodity) will not occur once the sum of all Commodity Amounts (Periodic) reach the agreed amount.

CONCLUSION

With the benefit of perspective, it appears the popularity of contractual rise and fall mechanisms is cyclical. In the current cycle, participants in the market will for some time be required to grapple with the impact of input cost volatility to reach a position on rise and fall that is acceptable to both clients and contractors.

REFERENCES

1. For example, since 1992 the annual change in the price of concrete has exceeded 5 per cent on only four occasions. Steel has perhaps been the notable exception, with prices fluctuating more than 20 per cent on four occasions within the same period.

2. This position has not always been the case in Australia, and is different from some international jurisdictions. In Australia, rise and fall provisions have been prevalent during periods of economic and political uncertainly—for example, during the Great Depression of the 1930s and again during the recession of the late 1980s (and the associated rapid depreciation of the Australian dollar). Internationally, rise and fall is commonplace in some international jurisdictions, either in widely–used standard form contracts or as a matter of law (e.g. in certain civil law European jurisdictions through 'material adverse change' relief, or in South Korea where state counter–parties are empowered to adjust contract prices due to price fluctuation).

3. There are exceptions to this rule. Many older forms of contract, some of which remain in use today, contain rise and fall mechanisms, which applied variously to the entire construction sum (e.g. the GC21 form used by the former NSW Roads and Maritime Services) or major inputs such as bitumen (e.g. the standard form amendments to AS 2124 used by the Australian Capital Territory Government Major Projects packages).

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CONSTRUCTION IN LIQUIDATION—THE OVERLAP BETWEEN THE *CORPORATIONS ACT* AND SECURITY OF PAYMENT LEGISLATION

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INTRODUCTION

In a recent decision, the Supreme Court of New South Wales considered an important question regarding the intersection of the *Corporations Act 2001* (Cth) (the Act) and the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOPA) for proofs of debt in a liquidation.[1]

The decision confirms that a statutory debt for a disputed claim does not crystalise under SOPA's distinct 'pay now, argue later' process until an adjudication determination is delivered.

KEY TAKEAWAYS

• Liquidators may reject proofs of debt lodged in respect of payment claims under the SOPA if the claims are disputed and have not been determined by an adjudicator.

• A statutory debt in respect of a progress claim under the SOPA only accrues when it is determined in accordance with the machinery of the SOPA. For example, a debt in respect of an agreed progress claim accrues when the claimant accepts the amount in a payment schedule, whereas a debt in respect of a disputed claim does not accrue until an adjudication determination.

• Liquidators should, however, be aware of alternative claims in contract or restitution that may be admissible to proof. Issues of set–off frequently arise and may also need to be determined in the proof of debt process.

BACKGROUND

In the matter of Nicolas Critini Pty Ltd (in liq) [2022] NSWSC 1149 (Critini) concerned an appeal against a rejection of a proof of debt.

Nicolas Critini Pty Ltd (company) retained Zadro Constructions Pty Ltd (Zadro) to construct a residential unit block in Westmead, Sydney.

On 17 October 2019, Zadro issued a payment claim pursuant to the SOPA to the company in the amount of $1,125,988.43. The company responded by serving a nil payment schedule on Zadro. Zadro made an adjudication application under the SOPA. On 6 December 2019, the adjudicator found that the company owed Zadro $927,727.80 in respect of the payment claim (debt).

On 22 November 2019, before the adjudication application was determined, the company entered voluntary administration. It subsequently entered liquidation and Zadro lodged a formal proof of debt for the debt. The company's liquidator (liquidator) disallowed the proof of debt, which was the subject of Zadro's appeal.

DECISION

Both parties agreed that the source of the debt was section 8 of the SOPA, which entitles a person who has undertaken work or supplied goods and services under a construction contract to a progress payment.[2] Accordingly, the court's decision hinged on when a statutory debt under section 8 of the SOPA accrues.

Zadro submitted that the debt accrued when the parties entered into the construction contract on 16 May 2017 and the SOPA regime merely quantifies the debt. Conversely, the liquidator contended that the debt only accrued when the adjudication application was determined. He argued that since there was no determination before the company entered administration, the debt was incurred after the 'relevant date' within the meaning of section 553(1) of the Act and was not admissible to proof.

Hammerschlag CJ agreed with the liquidator and dismissed Zadro's appeal. He reasoned that the statutory entitlement arising out of section 8 of the SOPA cannot be

enforced other than in accordance with the processes outlined in the SOPA. For example, where a progress claim is disputed and the payment schedule is not accepted by the claimant, the amount in dispute must be the subject of an adjudication determination to give rise to an enforceable debt.

ALTERNATIVE CLAIMS

The Supreme Court of New South Wales' decision specifically notes that Zadro's rights, if any, under the construction contract were preserved. Claimants will generally have at least one alternative claim to payment, commonly either:

- *quantum meruit*, if the claimant has undertaken work, the contract has been repudiated or terminated and the contractual right to payment has not yet accrued; or
- a claim in contract, if the claimant's contractual right to payment has accrued.

Zadro did not assert an alternate claim in Critini. SOPA creates an interim debt that is payable 'on account' and subject to a later determination of the parties' rights under the construction contract.

However, the statutory debt created by SOPA may have been attractive as claims in *quantum meruit* are generally limited to the contract price and may require the claimant to prove the value of the work undertaken. Contractual claims may also be difficult as construction contracts generally provide that a principal is only liable to pay the scheduled amount to a contractor.

OTHER INTERSECTIONS OF THE ACT AND SOPA

Critini confirms in passing that an adjudication application is not stayed by virtue of voluntary administration, describing a letter from the administrators' solicitors advancing that argument as unsustainable.

However, there is generally little practical benefit for claimants against an externally administered company in continuing the adjudication process.

In Victoria and New South Wales progress payments under the SOPA cannot be enforced by liquidators. In *Façade Treatment Engineering Pty Ltd (in liq) v Brookfield Multiplex Constructions Pty Ltd* [2016] VSCA 247, the Victorian Court of Appeal (VCA) held that an entity in liquidation has no entitlement to payments under the SOPA.

Subsequently, in *Seymour Whyte Constructions Pty Ltd v Ostwald Bros Pty Ltd (in liq)* [2019] NSWCA 11, the New South Wales Court of Appeal labelled the VCA's position as 'plainly wrong' and held that liquidators can initiate progress payments under the SOPA.

However, subsequent changes to the New South Wales SOPA now prohibit its use by companies in liquidation to enforce a payment claim (including by adjudication). There are no reported cases considering the application of SOPA legislation to other insolvency processes, such as voluntary administration, so the position is less clear outside of liquidation.

The most common issue that arises in adjudicating on claims is set–off, either under the construction contract, equitable set–off or section 553C of the Act. Complicated legal and factual issues may arise when adjudicating on proofs where there are countervailing claims.

CONCLUSION

Adjudicating on proofs of debt in these circumstances (particularly where there are set–off claims) can be complicated. *Critini* provides liquidators with some certainty when assessing proofs of debts based on progress claims under the SOPA.

However, claimants may also make *quantum meruit* and breach of contract claims, so being unable to rely on SOPA is not necessarily determinative.

REFERENCES

1. In Victoria, section 9 of the *Building and Construction Industry Security of Payment Act 2002* (Vic) provides the statutory basis for a progress claim.

2. *In the matter of Nicolas Critini Pty Ltd (in liq)* [2022] NSWSC 1149.

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BREACH OF CONTRACT OR BREACH OF STATUTORY WARRANTY? A LESSON ON LIMITATION PERIODS

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INTRODUCTION

Part 2C of the *Home Building Act 1989* (NSW) (HBA) sets out the statutory warranties which are implied into all contracts for residential building work. The statutory warranties are given by the holder of a contract licence (usually the builder) for the benefit of owners and serve as a guarantee that the works will meet a certain standard, for example, that the works will be done with due care and skill and will be in accordance with contract plans and specifications.[1] Section 18E(1) of the HBA provides that if a statutory warranty is breached, the limitation period for commencing proceedings is six years in the case of major defects, and two years in other cases.

In *Onslow v Cullen* [2022] NSWSC 1257, Justice Adamson considered the applicable limitation period where defective residential building works amount to both a breach of contract and a breach of the statutory warranties. The decision has important consequences for owners bringing a claim for breach of the statutory warranties, particularly in respect of non–major defects.

FACTS

In January 2016, Mr Onslow, the builder, contracted with Mr and Mrs Cullen, the owners, to carry out building work on their residential property.[2] The contract was in the standard form issued by the Housing Industry Association (HIA) and clause 39 incorporated the statutory warranties into the contract.[3]

In April 2017, the builder left the property before completing the building works.[4] In August 2019, the owners commenced proceedings against the builder, claiming damages for breach of contract in respect of the incomplete works and certain defects in the completed works.[5]

A dispute arose as to the applicable limitation period for the owners' claim:

- The builder argued that the defects in the completed works were non–major defects, and therefore that a two–year limitation period applied to the claim under section 18E(1)(b) of the HBA.[6] Since the owners commenced the proceedings two years and four months after the builder left the site, this would mean that the portion of the claim relating to defects in the completed works would be statute–barred and the owners would be unable to recover.
- The owners argued that they had framed their claim as breach of contract, not breach of the statutory warranties, so a six–year limitation period should apply.[7]
- Both parties accepted that the incomplete works constituted major defects, and therefore a six–year limitation period would apply regardless of whether the claim was framed as breach of contract or as breach of statutory warranty.[8]

LIMITATION PERIOD— TWO YEARS OR SIX?

Justice Adamson considered that the applicable limitation period for the non–major defects was two years.

RELEVANT PRINCIPLES FROM THE *LIMITATION ACT 1969* (NSW) (*LIMITATION ACT*)

While limitation period for breach of contract is typically six years,[9] section 7(a) of the *Limitation Act* provides that where legislation specifies another limitation period, that other limitation period will apply. Therefore, Justice Adamson held that if the owners claim could be properly characterised as a claim for breach of statutory warranty, the two–year limitation period under section 18E(1)(b) of the HBA would take precedence over the typical six–year limitation period for breach of contract.[10]

CLAUSE 39 OF THE CONTRACT

The owners' argument that they had framed their claim as breach of contract, not breach of statutory warranty, did not impact the applicable limitation period. Justice Adamson emphasised that a statutory warranty is merely a contractual term which has been implied by statute.[11] The fact that the statutory warranties were expressly incorporated into clause 39 of the contract did not change the nature of the owners' claim.

Justice Adamson construed clause 39 and held that the parties objectively intended that the statutory warranties would only be given in so far as is required under the HBA, i.e., that the warranties for non–major defects would only be given for two years. This was because:

- section 7(2)(f) of the HBA requires that the statutory warranties are included in the HBA;[12] and
- the statutory warranties in clause 39 were expressed subject to the qualification 'to the extent required by the Act, the builder warrants that […]'.[13]

OTHER RELEVANT CONSIDERATIONS

Justice Adamson also highlighted section 18G of the HBA, which prevents parties from restricting or removing statutory warranties 'to remove the rights of a person'. His Honour emphasised that 'a person' in section 18G applies equally to builders as well as owners, and a builder has a right not be sued in respect of non–major defects after the two–year period has expired.[14] Section 18G therefore provided support for the construction that the applicable limitation period in respect of the non–major defects was two years.

Finally, Justice Adamson noted that the contract was in the standard form issued by the HIA. Accordingly, it could not be described as having been 'prepared by the builder' and therefore could not be construed against the builder.[15]

DECISION

Justice Adamson held that the owners' claim in respect of the non–major defects, being the defects in the completed works, was governed by the two–year limitation period in section 18E(1)(b). As a result, this portion of the owners' claim was statute–barred, and the owners could not recover this amount.[16]

TAKE HOME TIPS

In cases involving defective residential building works, owners should avoid delay in commencing proceedings. Even where a contract is in place, a short limitation period may apply if the defects are non–major.

Owners should seek legal advice promptly to preserve their ability to commence proceedings.

REFERENCES

1. *Home Building Act 1989* (NSW) section18B(1)(a).
2. *Onslow v Cullen* [2022] NSWSC 1257, [1].
3. *Onslow v Cullen*, [10]–[13].
4. *Onslow v Cullen*, [1].
5. *Onslow v Cullen*, [2].
6. *Onslow v Cullen*, [2].
7. *Onslow v Cullen*, [29].
8. For the limitation period for breach of contract, see *Limitation Act 1969* (NSW) section 14(1)(a). For the limitation period for breach of statutory warranty which results in a major defect, see *Home Building Act 1989* (NSW) section 18E(1)(b).
9. *Limitation Act 1969* (NSW) section14(1)(a).
10. *Onslow v Cullen*, [52].
11. *Onslow v Cullen*, [58].
12. *Onslow v Cullen*, [55]–[56].
13. *Onslow v Cullen*, [56].
14. *Onslow v Cullen*, [59]–[60].
15. *Onslow v Cullen*, [61]–[62].
16. *Onslow v Cullen*, [63].

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FAILURE TO FOLLOW DEFECT RECTIFICATION REGIME NOT A BAR TO DAMAGES

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In the recent decision of *Hacer Group Pty Ltd v Euro Façade Tech Export SDN BHD* [2022] VSC 373, the Victorian Supreme Court found that failure to comply with the provisions governing notification and rectification of defects did not preclude a party from relying on its common law rights to recover costs arising from rectification works.

Hacer Group Pty Ltd (builder) engaged Euro Façade Tech Export SDN (subcontractor) to design, engineer, procure, manufacture, fabricate and supply a façade system.

The builder commenced proceedings against the subcontractor alleging (amongst other things) that the subcontractor's works were defective, and that the contractual indemnity entitled the builder to remedy the breach and recover the costs from the subcontractor as a debt due.

The subcontract required the builder to notify the subcontractor of any defects and provide it with the opportunity to rectify. If the subcontractor failed to rectify within the requisite timeframe, the builder was entitled to engage others to complete the rectification works at the subcontractor's cost.

In relation to certain defect claims, the subcontractor argued that the builder had failed to notify it of the defect and denied it the opportunity to rectify. The subcontractor contended that the builder's entitlement was limited to recovering the cost the subcontractor would have incurred to remedy the defect had the contractual process been followed.

In determining this issue, Justice Stynes relied upon the following:

- a broad indemnity provided by the subcontractor, which was not qualified by reference to the defect rectification provisions. Specifically, the subcontract stated that subcontractor would indemnify the builder against 'any and all costs, expenses, loss or damage of whatsoever nature … [which is] in any way connected with any breach by [the subcontractor] …'; and
- the fact the subcontract did not contain clear words excluding the subcontractor's liability for damages.

Having regard to these factors, her Honour found that this case was to be distinguished from the factual scenario in *Turner Corporation Ltd v Austotel Pty Ltd* (1994) 13 BCL 378 where it was held there was no entitlement to recover costs for third–party rectification work due to procedural missteps.

That is, her Honour held that the builder could rely on its common law rights to damages even in circumstances where it had failed to comply with the contractual provisions regarding the notification and rectification of defects.

This decision serves as a reminder to parties when negotiating contractual indemnities to carefully consider how those indemnities will operate in relation to contractual regimes in the event of a breach of contract.

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DOMESTIC BUILDING DISPUTES AND DELAYS AT VCAT—COUNTY COURT AFFIRMS DECISION TO BYPASS VCAT JURISDICTION

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INTRODUCTION

On 29 October 2021, in the decision of *Uber Builders and Developers Pty Ltd v MIFA Pty Ltd* [2021] VCC 1677, the County Court reiterated its position that the present pandemic–induced delays in the Victorian Civil and Administrative Tribunal (VCAT) have become so severe that, despite being chiefly responsible for hearing domestic building disputes under legislation, VCAT could be bypassed in the current circumstances.

This finding makes overtly clear the County Court's position on the interpretation of its obligation to stay proceedings for domestic building disputes where the dispute is one that 'could be heard by VCAT' and provides significant comfort for parties that commencing proceedings for domestic building disputes directly in Victorian courts is now a feasible option while conditions persist.[1]

WHAT HAPPENED?

Under section 57 of the *Domestic Building Contracts Act 1995* (Vic) (the Act) a court must stay any action arising from 'a domestic building dispute' as VCAT is to be chiefly responsible for resolving such disputes.

MIFA Pty Ltd (MIFA) entered into a construction contract with Uber Builders and Developers Pty Ltd (Uber) for the construction of 11 residential apartments, a basement carpark and a commercial space in Brunswick. A dispute arose regarding completion of the works, and Uber subsequently commenced proceedings in the County Court. MIFA argued that the County Court proceedings should be stayed on the basis that it was a domestic building dispute that could be heard by VCAT.

WHAT DID THE COURT DECIDE?

In *Impresa Construction Pty Ltd v Oxford Building Group Pty Ltd* [2021] VCC 1146, Judge Burchell commented that questions of delays and resourcing were relevant in considering whether a dispute was one that 'could be heard by VCAT'. However, the stay application in *Impresa* was dismissed ultimately because her Honour found that the dispute was not a domestic building dispute.

In the present case, the parties agreed that the dispute was a domestic building dispute. However, the court held that VCAT's capacity constraints alone were enough to dismiss the stay application and that this was a valid interpretation of the Act for the reasons suggested in Impresa.

WHY IS THIS IMPORTANT?

Until otherwise overruled by a superior court (such as the Victorian Court of Appeal), there is now a strong precedent that parties to domestic building disputes may commence proceedings in the County Court (and potentially the Supreme Court) rather than in VCAT while conditions persist.

This temporary freedom to choose which forum to commence proceedings in is one that must be carefully considered—each forum has its own strategic advantages and disadvantages which will turn on the particular facts of the matter.

REFERENCE

1. For further information on the delays currently affecting VCAT, please see our previous Critical Path article https://hwlebsworth.com.au/vcat–delays–and–under–resourcing–foreshadow–overhaul–of–domestic–building–dispute–proceedings/

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