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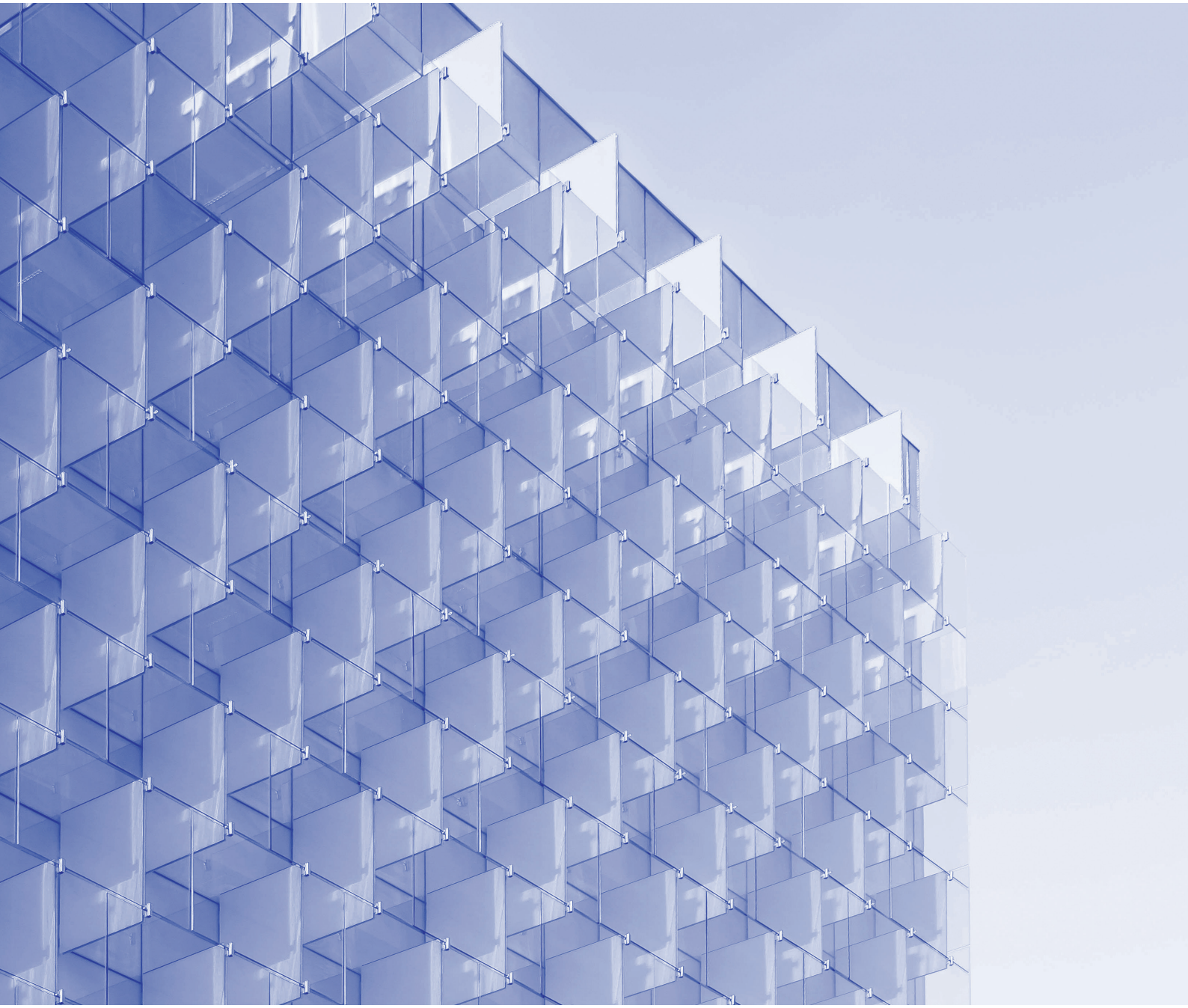

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ACKNOWLEDGEMENT OF COUNTRY
The ACLN acknowledges the Australian Aboriginal and Torres Strait Islander peoples of this nation. We acknowledge the traditional custodians of the lands on which our company is located and where we conduct our business.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

CONTENTS #212
ARTICLES

CONTENTS #212
ARTICLES

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

EDITORIAL

Myra Nikolich

The Honourable the Chief Justice Sundaresh Menon believes that with the coming into force of the Singapore Convention on Mediation, we are witnessing the dawn of mediation's golden age. His Honour suggests that mediation's place in today's dispute resolution landscape should not be understated on account of its recency, because mediation offers a unique value proposition when compared to the alternatives. The Chief Justice explains why he considers that we are at the dawn of a golden age; namely, because mediation's foremost challenge, that of enforceability, is being swept away by the Convention. It is worth noting that the Singapore Convention, having been modelled after the New York Convention, shares the brevity and clarity of that Convention's approach. His Honour concludes by offering some suggestions as to what we should do to usher in this golden age.

Andrew Stephenson, Dr Phoebe Wynn–Pope and Dr Louise Camenzuli discuss the various stages of a project and offer some key considerations for project proponents for successful delivery of major projects. The authors note that many proposed projects fail at an early stage, usually because they are not economically viable, whilst others pass through these stages yet fail to achieve their economic objectives, including failing to properly take account of environmental, social and governance (ESG) matters. The authors explore ESG matters that should be carefully considered at each stage of the project.

David Lee, Mitchell McMartin, Stephanie Weeks and Chloe Parker discuss *MS Amlin Corporate Member Ltd v LU Simon Builders Pty Ltd* [2023] FCA 581, a case which affirms that notification of facts concerning a 'wide problem' can be made under section 40(3) of the *Insurance Contracts Act 1984* (Cth). The case highlights that the notification is in the details—including hyperlinked newspaper articles, opinions given by persons of expertise, and underwriting documents. As the authors illustrate, it is a timely reminder to insurance industry professionals to carefully consider the facts and circumstances of a notification.

Benjamin Hicks provides an analysis of when it is reasonable for a principal to engage a third party to rectify the contractor's defects. He explores the consequences to damages recoverable by a principal where a third party is engaged to rectify defects without the contractor having been afforded the opportunity to rectify its own defects or the principal has not complied with the contractual mechanisms in the building contract. The author provides helpful Australian and English common law examples and questions whether it is time for the High Court to intervene.

Philip Davenport discusses *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd* [2023] NSWSC 343 and *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd (No 3)* [2023] NSWSC 881. According to the author, the cases are interesting for a number of reasons but most importantly for the finding that the owner was entitled to *Hungerfords* interest for the period of delay and was not limited to liquidated damages for the period of delay.

Melissa Koo reminds us that a significant change is on the horizon for companies using standard form contracts. New unfair contract terms reform is set to take effect from 9 November 2023, ushering in a pivotal shift in the contracting landscape. Companies should carefully

review and potentially amend their standard contracts to ensure compliance with the upcoming changes and avoid the risk of hefty penalties under the Australian Consumer Law.

Nicole Wearne, Sarah Metcalfe and Hayley Matthews discuss the recent passing of the *Justice Legislation Amendment Act 2023* (Vic). The amendments are expected to bring greater efficiency to the Building and Property List in the Victorian Civil and Administrative Tribunal (VCAT) as it means that Part IV (of the *Wrongs Act 1958* (Vic)) contribution claims can now be determined by VCAT. The authors look at how amendments to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) and the *Wrongs Act* are expected to impact clients.

Christina Knorr discusses how a single unit fire in 2014 established amendments in over five New South Wales statutes and authoritative bodies. However, as the author notes, legislative reform is rendered almost useless if it is not abided by—laws are inadequate if builders, developers and insurers ignore and do not uphold or implement these changes.

Matthew Taylor, Ryan James and Maggie Laing discuss *Marques Group Pty Ltd v Parkview Constructions Pty Ltd* [2023] NSWSC 625, a case that confirms that a misleading and deceptive conduct defence can be successful in defeating an application for summary judgment under the *Building and Construction Industry Security of Payment Act 1999* (NSW). The case marks a step away from the 'pay now, argue later' system.

Sophy Woodward discusses *FKP Commercial Developments Pty Ltd v Zurich Australian Insurance Ltd (No 2)* [2023] FCA 582, a case which has clarified the scope of cover for construction activities where policies have a particular type of extension clause. The decision has important implications for construction companies and insurers and serves as a reminder to be aware of the precise wording of an insurance policy, including how particular clauses may be interpreted in the context of the policy as a whole.

Lina Fischer, Richard Siou, Danielle Mizrahi and Jason Hooper discuss the Building Legislation Amendment Bill 2023 (NSW). The Bill amends various Acts with a view to improving customer protection for homeowners, increasing accountability for unsafe building products and ensuring the regulator is well equipped to tackle poor behaviour in the industry and serious defects in in homes. The authors highlight some of the key amendments of the Bill.

Rani John, Peter Richard and Phimister Dowell discuss *The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23. In this case, the High Court considered the meaning of 'value of the benefit' under section 70.2(5) of the *Criminal Code Act 1995* (Cth) for the purpose of determining how the appropriate maximum penalty for a foreign bribery offence should be calculated. The decision reinforces the significant monetary penalties that may apply to businesses found to have committed a foreign bribery offence, consistent with the OECD Convention requirement that penalties should be 'effective, proportionate and dissuasive'.

Andrew Moore, Robert Finnigan and Chris Knight report on the New South Wales government's proposed practice standard for engineers, which includes imposing a new obligation to ensure that designs for professional engineering work are 'fit for purpose'. According to the authors, while the practice standard will not create a statutory duty, its introduction as a condition of registration will create a de facto statutory 'fitness for purpose' obligation on engineers. The authors discuss the content of the proposed change, its likely consequences, and whether it is really needed.

MEDIATION—AT THE DAWN OF A GOLDEN AGE

The Honourable the Chief Justice Sundaresh Menon

Chief Justice of the Supreme Court, Singapore

INTRODUCTION

Dispute resolution is coming to be seen today as resting on three principal foundations: litigation, arbitration and mediation. Whereas the amicable resolution of disputes has historically played an important part in our societies,[1] the rise to eminence of mediation as a key contributor to the rule of law as part of our justice systems is a quite modern phenomenon.

In my remarks today, I will begin with the suggestion that mediation's place in today's dispute resolution landscape should not be understated on account of its recency, because mediation offers a unique value proposition when compared to the alternatives. I will go on to explain why I consider that we are at the dawn of a golden age for mediation, because its foremost challenge, that of enforceability, is being swept away by the Singapore Convention on Mediation. I will then conclude by offering some suggestions as to what we should do to usher in this golden age.

PLACE OF MEDIATION IN DISPUTE RESOLUTION

TRADITIONAL APPROACH TO DISPUTE RESOLUTION

All of us would have grown up in a time when dispute resolution was understood to be synonymous with litigation and arbitration. At their core, these are both adjudicative approaches to dispute resolution: they involve a neutral and impartial third party pronouncing upon the legal rights and wrongs of a case by making factual findings and then applying the law to them.

While the practice of dispute resolution has undoubtedly seen many changes over the past few decades, some of the most prominent of these, such as the growth of international commercial arbitration and investor–state dispute settlement, and the more recent rise of international commercial courts,[2] have all been built upon these same foundations of the adjudicative process.

Arbitration and litigation each have their merits and demerits. But there is also a growing recognition of the reality that purely adjudicative approaches to dispute resolution are bedevilled by certain challenges. Some of these are long–standing, while others are new, emerging, and in some respects worsening.

The first and most obvious of these is the ever–increasing level of the time and cost that is entailed in the process. This is rooted in the vital need for fairness in any adjudicative process, which in turn necessitates extensive procedural formalities and an often protracted series of interlocutory steps to get a case ready for hearing. This cost of ensuring procedural fairness scales up steadily with the size and complexity of the dispute. One estimate has put the total cost of litigation conducted by Fortune 500 corporations at as much as one–third of the companies' after–tax profits.[3] This is an issue that plagues litigation and perhaps to an even greater extent, international commercial arbitration, where costs awards in the largest cases routinely exceed US$10 million.[4] Indeed, surveys show that international arbitration practitioners and users consider 'cost' to be by far the worst characteristic of international arbitration.[5]

This challenge is exacerbated by a more recent phenomenon known as the complexification of disputes.[6] This refers to the growing complexity of disputes, which manifests in increasing technical and evidential complexity. Technical complexity arises from the increasing amount of domain–specific scientific and technical knowledge that adjudicators need to grapple with.[7]

In a world where contracts are entered into using algorithms and vehicles are starting to drive themselves, even relatively simple disputes can involve an inquiry into complex technical issues. At the same time, the evidential complexity of disputes has exploded, because we now rely heavily on digital communications in every aspect of our lives. This means that vast amounts of data are generated even in a modest transaction, resulting in volumes of documentary evidence that tribunals, lawyers and parties will all have to sift through and digest to come to grips with any dispute.[8]

Complexification will require ever–increasing amounts of time and cost to be expended in the search for justice using a purely adjudicative approach to dispute resolution. And beyond this, the complexification of disputes gives rise to the very real possibility of disputes becoming so large and complex that a human adjudicator may not even be mentally capable of absorbing and processing all of the material.[9] By way of example, in one construction arbitration, the claimant was said to have asserted more than 120,000 disruptive events that impacted the project's schedule, while the respondent counterclaimed for thousands of defects.[10] In such a case, it would be virtually impossible for a trier of fact to give each disputed fact the sort of attention that would typically be needed to make a sound determination of the parties' rights. This seems to cry out for an approach that would radically downsize and simplify the issues in dispute; but an adjudicator would be hard–pressed to achieve this if either of the parties were to insist on advancing and trying its claims as pleaded.

This leads me to the next set of major challenges that bedevil adjudicative modes of dispute resolution, and that is the lack of control over process and outcomes. This is perhaps most evident in litigation, because procedural and evidential rules in litigation were devised in a different time and with a very different understanding of the likely scale of typical disputes; and they were designed to ensure scrupulous fairness, in cases where the parties were typically locked in a hostile stance towards each other. In such cases, the process is usually binary, producing a winner and a loser; and it incentivises the deployment of procedural skirmishes to achieve tactical victories. While arbitration was once thought to offer a better process characterised by procedural flexibility and proportionality, it, too, has become dogged by its own challenges. Nearly 35 years ago, Lord Mustill wryly observed that international commercial arbitration might be acquiring in his words 'all the elephantine laboriousness of an action in court, without the saving grace of the exasperated judge's power to bang together the heads of recalcitrant parties'.[11] In more recent times, I have spoken about the phenomenon of 'due process paranoia':[12] this describes the widely observed trend of disgruntled parties contriving allegations of breaches of natural justice in an effort to set aside an arbitral award. It has been suggested that this has caused some arbitrators to become overly cautious and to indulge the dilatory tactics of parties, for fear of their awards being set aside.

Accompanying this lack of control over process in adjudication is the parties' lack of control over outcomes. Simply put, all power over the outcome is vested in the hands of the adjudicator, who will be assisted by counsel. But the adjudicator's assessment will turn on issues which are designated as having legal significance by the dictates of legal doctrine. These will often be narrow issues which may not correspond to the parties' concerns when they entered into the transaction in the first place. When a dispute arises, the parties' real interests usually concern finding a workable path forward, remedying the problems they have encountered, and maintaining and repairing working relationships. On the other hand, an adjudicative approach to dispute resolution, with its attention to scrutinising and allocating fault, places a heavy focus on the past, gives only secondary importance to the present, and pays very little, if any, attention to the future.

MEDIATION'S UNIQUE VALUE PROPOSITION

The challenges I have outlined can seem almost insurmountable if we conceive of dispute resolution as being focused single–mindedly on a search for the truth between warring parties. But, as I have argued in the context of complexification, it is no longer feasible or desirable to assume that justice requires, in every case, a full and exhaustive determination of the facts or of the legal rights and wrongs.[13]

First, this will not always even be possible to achieve in the kinds of hyper–complex disputes that we are beginning to see today. Second, the devotion of the required level of resources to this exercise in some disputes comes at the expense of other parts of the justice system, and potentially the ability of many others to access the justice system at all. It follows that this endeavour carries a broad societal cost that we need to keep very much in mind. Third, and most importantly, it is often not what the parties themselves really want, as I have just explained.

We should therefore be careful not to equate dispute resolution with adjudication. Nor should we think that adjudication is the primary or default means of dispute resolution—something

that the label 'alternative dispute resolution', which is typically applied to non–adjudicative modes such as mediation, tends to reinforce. Instead, we should recognise that dispute resolution comes in multiple co–equal forms each with its own role: both adjudicative approaches such as litigation and arbitration, and non–adjudicative and non–rights–based approaches, such as mediation.

This would open the way for us to see mediation as an equally viable option for dispute resolution that offers a neat answer to many of the problems of the adjudicative approach. First, mediation has some clear advantages in terms of time and cost. The Singapore Mediation Centre ('SMC') reports that 90 per cent of its successful mediations take no longer than one day.[14] One can immediately see the immense potential of mediation to alleviate access to justice concerns.

Simply put, many disputants may be able to make use of mediation to address legal needs or challenges that would otherwise have gone unaddressed altogether because it was not possible, or not worthwhile, to expend the time and cost of going through an adjudicative process.

Relatedly, mediation is much more accessible to lay litigants because the kinds of concerns that are ventilated in a mediation are precisely those that ordinary people think about in a dispute, without having to go through the alien and difficult task of trying to translate and frame those concerns in terms of legal issues and arguments. And even if the dispute is not ultimately settled after mediation, going through the process can often narrow the issues and lead to a much clearer focus on what really separates the parties, when they proceed to an adjudicative process.

Second, mediation preserves the parties' control over process and outcome, since the mediation process is driven by the concerns that the parties express to the mediator and to each other, and the outcome of the mediation is shaped by the parties themselves, albeit with the assistance of the mediator. As a result, mediation has proven to be highly effective. The SMC, for instance, has a success rate of 70 per cent.[15] It bears mentioning that success in a mediation by definition involves a resolution that all the parties are reasonably satisfied with. This therefore goes beyond simply resolving the dispute at hand and also translates to a higher chance of compliance and of preserving the parties' relationship.

In Singapore, we have seen mediation's versatility and success across all areas of dispute resolution. Besides the SMC, which provides a broad–based, generalist mediation service, we have used mediation in Singapore in a number of specialised areas.

Family justice is a quintessential example of when mediation should very often be the first port of call. Although the spousal relationship will usually have broken down by the time the parties seek recourse from the family justice system, there will be a strong persistent interest in maintaining at least a functional relationship between them, to enable them to deal with the ancillary issues that invariably arise in the divorce, and this will continue well into the future in cases where the couple has children. It is therefore important to focus on the repairing of the relationship with an eye towards the future even as the couple seeks to separate from their unhappy past.[16] In addition, the process needs to be holistic, because the legal issues in family justice will invariably be undergirded by broader, non–legal issues.

Mediation is the mode of dispute resolution that addresses all of these needs. Recognising this, the family justice system in Singapore has placed increasing emphasis on its use, especially where there are children involved. Thus, between 1996 and 2014, the law was progressively amended to require all divorcing couples with children under the age of 21 to undergo mandatory mediation or counselling,[17] and to empower family judges to order the parties to undergo mediation.[18]

In recent years, we have sought to meet the need for a restorative, holistic and forward–looking approach to family justice by integrating all the aspects of our family justice system under the overarching philosophy that we know as therapeutic justice. When we apply therapeutic justice, problem–solving, rather than fault–finding, becomes the core focus and concern of the family justice system.[19] It therefore emphasises multidisciplinary approaches to family dispute resolution accompanied by the use of mediation and conciliation.

It is not difficult to appreciate how a similar problem–solving approach could be useful in our efforts to resolve disputes within the wider community. In 1998, the Community Mediation Centre was set up to address this need.[20] Today, claims filed in our Community Disputes Resolution Tribunals may be referred to the Centre for compulsory mediation.[21] The same powers also apply to private prosecutions or Magistrate's Complaints, which are often rooted in community disputes as well.[22] This harks back to the age–old practice in almost every civilisation of having elders mediate and resolve disputes—including, for instance, the panchayat system in rural India.

Another area where preservation of the parties' relationships in the face of a dispute can be of great

benefit is in employment disputes. In 2011, the government, the trade unions and the employers' federation[23] in Singapore set up the Tripartite Mediation Framework to assist with the resolution of employment disputes involving professionals, managers and executives.[24]

The Employment Claims Tribunal was launched in 2017, and the parties to employment disputes are now required to undergo mandatory mediation at the Tripartite Alliance for Dispute Management (or 'TADM') before employment–related claims can be filed before the tribunal.[25]

Finally, we have also recognised that some types of commercial disputes can benefit from specialist mediation services. For instance, this can be especially true of construction disputes, which often emerge during the course of a project that will last for some time. In such a context, there will usually be a strong interest in preserving the relationship between the parties. Many construction disputes are complex and highly technical, and therefore may benefit from mediation by domain experts. To fill this need, the Singapore Construction Mediation Centre was set up in 2019 featuring a panel of mediators with construction expertise.[26]

THE DAWN OF A GOLDEN AGE

With all these advantages and a commendable track record of success across many domains of dispute resolution, it might seem surprising that mediation remains far less prevalent as a mode of dispute resolution today when compared to litigation and arbitration. In a 2019 survey of legal professionals conducted by the Singapore Academy of Law, only five per cent of respondents cited mediation as their preferred means of resolving disputes.[27]

As the respondents to the survey made clear, litigation and arbitration remain the predominant modes of dispute resolution principally because of concerns over enforceability. The long–held view was that even if a mediation proved successful, the parties might still have to resort to litigation to enforce the mediated settlement agreement if it was not subsequently complied with. In that sense, the parties could be back to square one, or worse—out of pocket twice, first for the cost of mediation and then of litigation.[28] This concern becomes heightened where the dispute is transnational in nature.[29]

It may be somewhat surprising to some of us that a similar concern once existed in the context of international commercial arbitration, but that has long been eliminated with the nearly universal adoption of the New York Convention, which has enabled the simple and effective enforcement of arbitral awards across borders.[30] Meanwhile, when it comes to international commercial litigation, foreign judgments can be enforced relatively easily under the domestic laws of most jurisdictions,[31] and efforts to supplement this through the harmonisation of laws internationally are well under way.[32]

It is for this reason that the Singapore Convention on Mediation[33] has been described as 'the missing third piece' in the framework for international dispute resolution.[34] Modelled after the New York Convention, the Singapore Convention shares the brevity and clarity of its approach. It applies to settlement agreements that result from the mediation of commercial disputes, and which are international in nature with reference to the places of business of the parties or the nature of the settlement agreement.[35]

Article 3 sets out the primary obligation under the Convention, which requires states parties to enforce such settlement agreements. Like the New York Convention, the Singapore Convention sets out in Art 5 an exclusive and limited set of grounds for the refusal of enforcement, thereby setting a ceiling on the scope for challenges against a settlement agreement.[36] These include grounds familiar from the New York Convention, such as the incapacity of one of the parties, the nullity or inoperability of the settlement agreement, and concerns based on the public policy of the state where enforcement is sought. In addition, there are very limited grounds for challenges based on the way the mediation was conducted: notably, where there has been a 'serious breach' by the mediator of standards applicable to the mediator or the mediation, but for which the resisting party would not have entered into the settlement agreement.[37]

It is clear that there was considerable appetite for the development of such an instrument to meet the needs of the international commercial community. The UNCITRAL Working Group was able to complete its work on the Singapore Convention within a short span of three years,[38] and on 7 August 2019, the day the Convention opened for signature, 46 countries, including the United States, China and India, signed the Convention. This was among the highest number of first–day signatories of any United Nations trade convention.[39] The Convention entered into force just a year later, on 12 September 2020.

After Singapore signed the Convention, our parliament promptly passed the *Singapore Convention on Mediation Act 2020* in preparation for our ratification of the Convention. In a reflection of its ease of implementation, the

Convention is given effect in the Act either by direct reference to the provisions of the Convention,[40] or by substantially replicating its provisions.[41] A short set of procedural rules were also enacted to provide the mechanism for applications to be made to the General Division of the High Court to record an international settlement agreement as an order of court for the purposes of its recognition and enforcement in Singapore.[42]

The adoption of the Singapore Convention also goes a long way towards tackling a related obstacle standing in the way of the more widespread adoption of mediation, and that is the question of its legitimacy. This stemmed from perceptions of the level of practical difficulties that would be encountered in mediation. The UNCITRAL Working Group on the Singapore Convention was told that mediation lacked the 'stamp of international legitimacy' that had been afforded to international commercial arbitration by the New York Convention, and this was one of the reasons commercial parties found it difficult to convince their business partners to engage in mediation.[43] By directly addressing the real and perceived challenges of enforcing mediated settlements, the Singapore Convention showcases the legitimacy of international commercial mediation, and this in turn is likely to have a halo effect in securing the legitimacy of mediation as a form of dispute resolution in general, because the practices and attitudes of commercial actors on the transnational plane will inevitably spill over to their domestic dealings.

WHAT LIES AHEAD

With the coming into force of the Singapore Convention, I believe we are now witnessing the dawn of mediation's golden age. I would like to come to the close of my address by offering three suggestions for ushering in this golden age, starting from the specific and moving towards the transnational system of commercial dispute resolution as a whole.

First, and most simply, we should raise awareness of the immense importance of the Singapore Convention and encourage its adoption by states and its use by commercial parties. At present, the Convention has 55 signatories and 11 states parties.[44] We therefore have some way to go, as we aspire towards a universal enforcement mechanism for international commercial mediation, similar to that which international commercial arbitration enjoys today. This process will naturally take some time. After all, the New York Convention has had a 60–year head start. But the Singapore Convention has already generated considerable momentum, as seen in the fact that just this past month, the United Kingdom government committed to signing and ratifying the Singapore Convention, following consultations held in 2019 and 2022.[45]

Second, we should pursue excellence in the practice of mediation. This would boost the reputation and legitimacy that mediation enjoys. To do this, we must strive to professionalise the practice of mediation and promote the development and recognition of standards for the training and accreditation of mediators.

This should start from the very early stages of professional training for lawyers so that new practitioners are socialised to the importance of mediation. In Singapore, we offer a module on mediation as part of the bar course. With the implementation of a new syllabus starting from 2024, we expect to make an introduction to mediation and mediation advocacy a part of the compulsory 'Dispute Resolution Practice' module. This will expose young lawyers to mediation from the very beginning of their legal practice, so that they will come to see it as a natural, indeed necessary part of the suite of dispute resolution options.

In time to come, we can expect all Singapore lawyers to be acquainted with the value proposition of mediation and how it works. But for legal professionals who want to practice mediation as a mainstay of their work, further training and accreditation should be provided. Mediation calls on different skills from litigation and arbitration: whereas a judge can take up the role of an arbitrator with relative ease, and advocates apply similar skills in litigation and arbitration, the same cannot be said of mediation. It is for this reason that we saw the need to entrust the setting of standards and the provision of accreditation for mediators to a professional body. Today, that role is fulfilled by the Singapore International Mediation Institute (or 'SIMI'). SIMI features a tiered accreditation structure, and systematically takes into account user feedback as a requirement for progression to higher tiers.[46] Members of the highest tier, known as SIMI Certified Mediators, can apply for cross–certification with the International Mediation Institute, which is an internationally recognised standards body.

Third, we should also enhance collaboration between judges, arbitrators and mediators. This is because commercial dispute resolution today should not be compartmentalised into these different modes. Instead, litigation, arbitration and mediation should come to be seen and understood as key components of the system of international commercial dispute resolution, with disputes flowing between them as the need arises.[47] Collaboration and exchange within this ecosystem will therefore be

essential for the effective resolution of disputes, and this can arise in a number of levels.

First, the judiciary's support for and understanding of mediation will be essential, because judges can play a highly beneficial role if they were to divert appropriate cases towards mediation.[48] A good example of this comes from the field of insolvency and restructuring.[49] In complex insolvencies where there are multiple claims of a similar nature, it will often be viable and beneficial to engage in what is known as 'similar claims mediation'. That was the experience of Judge James Peck, who presided over the insolvency of Lehman Brothers.[50] He recounted that the multitude of claims would have been 'overwhelming and well beyond the capacity of any single judge' had it not been for the mediation protocol he adopted, which yielded settlements worth billions of dollars. Similarly, in cases involving the development of a restructuring plan, the use of 'plan mediation' might allow the reaching of a consensus in otherwise intractable proceedings. A judge who is astute about such opportunities can encourage the parties to explore these options in appropriate cases.[51]

Second, commercial courts will have a responsibility for setting and enforcing standards in international commercial mediation, especially since Art 5 of the Singapore Convention, as I have mentioned, allows parties to seek the ruling of the courts as to whether there has been a serious breach of standards by the mediator.[52] Judges will not be in a position to articulate and rule on such standards without considerable familiarity with the practice of mediation. Furthermore, under the Singapore Convention, there is no notion of the seat of the mediation, unlike the concept of the seat of the arbitration.[53]

The jurisdiction where a mediation takes place therefore need not be the natural port of call for such challenges. Instead, they will be raised in whichever jurisdiction the settlement is sought to be enforced. Commercial courts must therefore be prepared to deal with challenges that concern the standards applicable to a mediation or mediator acting anywhere in the world. This clearly points to the need for judges to be aware of the nuances of mediation practice and standards.

Third, the advent of integrated dispute resolution models, such as multi–tier dispute resolution clauses and dispute boards, creates a further opportunity for synergy between adjudicators and mediators. Under such models, various techniques based on mediation are used either to dispose of disputes or to downsize and contain them so that what goes for adjudication is refined and limited. Each adjudicator or mediator presiding over a stage of the dispute holds only a piece of the puzzle, and they will need to be distinctly aware of how their roles fit together in the management of the dispute or the project as a whole.

CONCLUSION

Let me conclude by taking a step back to see where we stand today. Commercial litigation in its modern form is the product of centuries of evolution and experience, while the dramatic rise of international commercial arbitration has taken place over the past half–century or more. Our goal, I suggest, should be to bring mediation to a similar, if not higher, level of prevalence as these adjudicative modes of dispute resolution, and to secure for mediation the reputation and legitimacy that the leading commercial courts and arbitration institutions enjoy today. This may seem like a daunting task, but in today's world, where

... mediation's place in today's dispute resolution landscape should not be understated on account of its recency, because mediation offers a unique value proposition when compared to the alternatives.

the drawbacks of adjudication are difficult to ignore and the benefits of mediation are becoming increasingly obvious, I believe mediation will require a much shorter runway to accomplish this aim.

An important reason we should have confidence in this endeavour is the Singapore Convention, which institutionalises the important role of mediation. With its current trajectory, its widespread adoption may be achievable within the span of years rather than decades. I suggest, therefore, that the path forward is clear. If we vigorously promote the Singapore Convention, champion excellence in the practice of mediation, and encourage collaboration across the different components of the transnational system of commercial dispute resolution, I believe the dawn we are now witnessing will mark the beginning of a golden age of mediation.

This, in turn, promises a brighter future for us all by promoting better outcomes in the resolution of disputes, greater confidence in doing business across borders, and enhanced access to justice.

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13. 'The Complexification of Disputes' at para 43.

14. See https://www.mediation.com.sg/about-us/about-smc/.

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17. See *Women's Charter (Amendment) Act 2011*, section 5 read with the Women's Charter (Mediation and Counselling) (Prescribed Persons) Rules 2011; see, at present, section 139I of the Women's Charter 1961.

18. See *Women's Charter (Amendment) Act 1996*, sections 11 and 20 (power to refer parties to mediation in relation to issues of maintenance or custody of a child); section 26(9), *Family Justice Act 2014* (power to order mediation of the court's own motion).

19. See Justice Debbie Ong, 'Today is a New Day', speech at the Family Justice Courts Workplan 2020 (21 May 2020), at https://www.judiciary.gov.sg/news-and-resources/news/news-details/justice-debbie-ong-speech-delivered-at-the-family-justice-courts-workplan-2020 at para 42.

20. See 'Building Sustainable Mediation Programmes' at paras 24–28.

21. See section 30, *Community Disputes Resolution Act 2015*.

22. See section 15, *Community Mediation Centres Act 1997*.

23. The Ministry of Manpower, the National Trade Unions Congress and the Singapore National Employers Federation respectively.

24. See 'Building Sustainable Mediation Programmes' at para 33.

25. See section 3(1), *Employment Claims Act 2016*.

26. See Shabana Begum, 'New Mediation Centre to Resolve Disputes in Construction Sector Launched' (*The Straits Times*, 12 March 2019).

27. '2019 Study on Governing Law & Jurisdictional Choices in Cross–Border Transactions' at https://www.sal.org.sg/sites/default/files/PDF%20Files/Newsroom/News_Release_PSL%20Survey_2019_Appendix_A.pdf at p 3.

28. See Timothy Schnabel, 'The Singapore Convention on Mediation: A framework for the cross–border recognition and enforcement of mediated settlements' (2019) 19 *Pepperdine Dispute Resolution Law Journal* 1 (Schnabel) at 2–4.

29. See Schnabel at fn 8, referring to evidence presented to UNCITRAL by the American Society of International Law.

30. United Nations Convention on International Settlement Agreements Resulting from Mediation (20 December 2018, entered into force on 12 September 2020) (the Singapore Convention).

31. Convention on the Recognition and Enforcement of Foreign Arbitral Awards (10 June 1958, entered into force on 7 June 1959). With the accession of Timor Leste in January 2023, it now has 172 states parties.

32. See 'SIFoCC Multilateral Memorandum on Enforcement of Commercial Judgments for Money' (SIFoCC, revised 2nd edn, 2021) at https://sifocc.org/2021/04/21/sifocc-multilateral-memorandum-on-enforcement-now-with-international-working-group-commentary/, especially at p 15, para 33(21).

33. The Convention on Choice of Court Agreements (30 June 2005, entered into force on 1 October 2015) (the Hague Convention on Choice of Court Agreements), which has 32 states parties at present, provides a regime for the enforcement of judgments arising from contracts with an exclusive choice of court agreement. The Convention on the Recognition and Enforcement of Foreign Judgments in Civil or Commercial Matters (2 July 2019), which is not yet in force, aims to do the same for civil judgments in general.

34. Singapore Parliamentary Debates, Official Report (3 February 2020) vol 94 (Mr Edwin Tong Chun Fai, Senior Minister of State for Law) (3 February 2020 Hansard).

35. Art 1 of the Singapore Convention. Specifically, a settlement agreement is international where (a) at least two parties to the agreement have their places of business in different states, or (b) the parties' places of business is in a different state from the state in which a substantial part of the obligations under the settlement agreement is performed, or the state with which the subject matter of the settlement agreement is most closely connected.

36. See Sundaresh Menon, 'The Singapore Convention on Mediation and the Coming of a New Age', speech at the Supreme People's Court of Vietnam Workshop on Mediation (17 September 2019), at https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-speech-delivered-at-the-supreme-people-s-court-of-vietnam-workshop-on-mediation-2019 at para 36.

37. Art 5(1)(e).

38. See the 3 February 2020 Hansard, and Schnabel at p 5.

39. See the 3 February 2020 Hansard.

40. See section 3 of the Singapore *Convention on Mediation Act 2020*, which refers to the Convention for the definition of a settlement agreement that falls within its scope.

41. See sections 6–7 of the Singapore *Convention on Mediation Act 2020*, which substantially replicate Arts 4–5 of the Convention.

42. The Supreme Court of Judicature (Singapore Convention on Mediation) Rules 2020.

43. See Schnabel at p 3.

44. With the ratification of Uruguay on 28 March 2023: see https://uncitral.un.org/en/texts/mediation/conventions/international_settlement_agreements/status.

45. 'Government response to the Consultation on the United Nations Convention on International Settlement Agreements Resulting from Mediation (New York, 2018)' (United Kingdom Ministry of Justice, 2 March 2023). The response concluded that it was the right time for the United Kingdom to become a party to the Singapore Convention 'as a

clear signal to our international partners that the United Kingdom is committed to maintaining and strengthening its position as a centre for dispute resolution and to promote the United Kingdom's flourishing legal and mediation sectors' (at para 6.1). In a further encouraging sign, the response indicated that '[t]he UK will champion the Convention internationally to encourage further ratifications' (at para 6.14).

46. See https://www.simi.org.sg/What-We-Offer/Mediators/SIMI-Credentialing-Scheme.

47. See Sundaresh Menon, 'SIFoCC Playing its Part as a Cornerstone of a Transnational System of Commercial Justice', keynote address at the 4th Full Meeting of the Standing International Forum of Commercial Courts (20 October 2022) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-standing-international-forum-of-commercial-courts-2022 at para 18.

48. See Singapore's Rules of Court 2021 at Order 5, rule 3. Under rule 3(1), the court has the power to order the parties to attempt amicable resolution. Under rule 3(2), in deciding whether to exercise this power, the court must have regard to all the relevant circumstances.

49. For an overview of the different forms of mediation that can be applied in insolvency proceedings, see 'Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring' (Ministry of Law, 20 April 2016) at para 3.54.

50. See James M Peck, 'Plan Mediation as an Effective Restructuring Tool' (speech at the Singapore Academy of Law, 1 April 2019). For more on different forms of mediation that can be applied in insolvency proceedings, see 'Report of the Committee to Strengthen Singapore as an International Centre for Debt Restructuring' (Ministry of Law, 20 April 2016) at para 3.54.

51. See the comments of Kannan Ramesh J (as he then was) in *Re IM Skaugen SE and other matters* [2019] 3 SLR 979 at [94].

52. Art 5(1)(e) of the Singapore Convention.

53. There is therefore no concept in the Singapore Convention of 'setting aside' a settlement agreement, and challenges under the Singapore Convention are limited to challenges against enforcement: see, in this regard, Shou Yu Chong and Nadja Alexander, 'Singapore Convention Series: Why is there no 'Seat' of Mediation?' (Kluwer Mediation Blog, 1 February 2019) at https://mediationblog.kluwerarbitration.com/2019/02/01/singapore-convention-series-why-is-there-no-seat-of-mediation/.

This does not mean, however, that there would therefore be a likelihood of multiple inconsistent findings in proceedings involving the enforcement of a settlement agreement in multiple jurisdictions. Instead, the doctrine of issue estoppel can apply to such proceedings just as it does in the context of arbitral awards: see Sundaresh Menon, 'The Role of the National Courts of the Seat in International Arbitration', keynote address at the 10th Annual International Conference of the Nani Palkhivala Arbitration Centre (17 February 2018) at https://www.judiciary.gov.sg/news-and-resources/news/news-details/chief-justice-sundaresh-menon-keynote-address-delivered-at-the-10th-annual-international-conference-of-the-nani-palkhivala-arbitration-centre-2018-the-role-of-the-national-courts-of-the-seat-in-international-arbitration at paras 22–24.

Chief Justice Sundaresh Menon's paper was a speech his Honour delivered in New Delhi on 15 April 2023 at the Samadhan (Delhi High Court Mediation and Conciliation Centre) National Conference. The Chief Justice is deeply grateful to his colleagues, Assistant Registrars Huang Jiahui, Tan Ee Kuan and Wee Yen Jean, for all their assistance in the research for and preparation of this address. The paper was previously published on the Supreme Court of Singapore web site—19 April 2023. Published with permission.

ESG AND THE SUCCESSFUL DELIVERY OF MAJOR PROJECTS—KEY CONSIDERATIONS FOR PROJECT PROPONENTS

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INTRODUCTION

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

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

The various stages of a project include:

(1) Acquiring the title or rights which underpin the project.

(2) Obtaining environmental and planning approval.

(3) Capital raising.

(4) Conducting further due diligence on the project's viability, including considerations associated with project finance.

(5) Obtaining final approvals for the project, including all environmental, development and construction approvals.

(6) Constructing infrastructure necessary for the project, ensuring that the time, cost and quality of the construction meets required standards to achieve project viability.

(7) Operating the project.

(8) Selling or decommissioning the project.

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

ESTABLISHING THE PROPERTY RIGHTS NECESSARY FOR THE PROJECT TO PROCEED

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

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

FPIC has both procedural and substantive requirements. It is a principle derived from the right to self–determination, articulated in the United Nations Declaration on the Rights of Indigenous People ('UNDRIP'), and required as an indication of respect for Indigenous peoples, to enable them to realise their rights and to ensure their protection. FPIC should be realised before any rights are impacted, which means well before the project begins.

Engaging in respectful consultation with impacted First Nations communities to obtain consent will assist in the planning and permit process and help prevent operational delays. It is also an important part of a social licence to operate. The Federal Court has recently demonstrated a willingness to identify principles consistent with FPIC in legislated consultation processes.[1]

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

This year, some major projects have been affected by injunctions or other allegations that relate to ESG matters. Subsequent claims that there has been a failure to properly take account of ESG issues can lead to very significant delays to the critical path to completion of the whole project.

This is particularly so in a current regulatory environment where there has been a significant widening of the gap between social expectations and legal obligations necessary to operate. Delays to completion, and therefore income generation, will lead to a consequential diminution in the net present value of the project. In serious cases, such a delay can result in the assumptions in the business case being falsified to the extent that the project is no longer viable.

ENVIRONMENTAL AND PLANNING APPROVALS

It is also important to ensure that there are no fundamental environmental issues which will preclude the proposed project. These issues are also important at the time of establishing rights to the necessary property for the project. If there is a known

environmental issue that will preclude development, the acquisition should not proceed.

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

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

CAPITAL RAISING

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

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

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

DEBT FUNDING

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

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

OBTAINING FINAL PLANNING AND ENVIRONMENTAL APPROVALS

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

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

CONSTRUCTION

The construction of any major project requires a sensitive approach to matters arising under State and Commonwealth legislation. However, environmental and social issues that go beyond legislative and regulatory requirements can arise if stakeholder expectations are not met. This may arise in respect of the expectations of First Nations people regarding certain projects.

Nevertheless, the management of these expectations extends to other stakeholders and can relate to matters involving material selection, water consumption, human rights and procurement practices. Despite significant efforts to identify heritage issues prior to commencement of construction, it is necessary to manage new heritage issues which arise as a consequence of

discovering matters of Aboriginal heritage during construction.

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

OPERATION

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

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

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

DECOMMISSIONING

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

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

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

LOOKING AHEAD

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

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

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

REFERENCES

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2. See the NoPSA case (supra).

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

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RECEIVED A NOTIFICATION OF FACTS OR CIRCUMSTANCES? A VALID SECTION 40(3) ICA NOTIFICATION MAY BE IN THE DETAILS

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INTRODUCTION

A recent decision by Justice Jackman in the Federal Court of Australia affirms that notification of facts concerning a 'wide problem' can be made under section 40(3) of the *Insurance Contracts Act 1984* (Cth), ('ICA') and highlights that the notification is in the details—including hyperlinked newspaper articles, opinions given by persons of expertise, and underwriting documents.

MS Amlin Corporate Member Ltd v LU Simon Builders Pty Ltd [2023] FCA 581 is one of few recent Australian authorities on 'hornets' nest' notifications.

BACKGROUND

This case concerns the notification of the 'Atlantis Claims', being three separate claims by owners of various parts of the Atlantis Tower in Melbourne. That building was built by the insureds using aluminium/polyethylene composite panels (or 'ACPs'), the costs of replacing which were claimed from the insureds.

The Atlantis Claims came about after investigation by the Metropolitan Fire Brigade ('MFB') and the Municipal Building Surveyor for the City of Melbourne ('MBS') into a fire on 25 November 2014 at the Lacrosse Tower in Docklands, which was also built by the insureds. The investigation concluded that the ACPs fitted onto the Lacrosse Tower (Alucobest) did not comply with the Building Code of Australia ('BCA') and had contributed to the rapid spread of the fire.

The Victorian Building Authority ('VBA') subsequently commenced an investigation, including into the conduct of the insureds. As part of that investigation, the VBA audited about 170 high–rise buildings in Melbourne. The VBA found that the ACPs on the Atlantis Tower (Alcotex) were combustible, and building orders were subsequently issued requiring its replacement.

Excess Layer Insurers disputed that they were notified of facts that gave rise to the Atlantis Claims in the sense completed by section 40(3) prior to the expiry of the insureds' 2014/2015 policies. All other parties contended that notification was made.

THE SECTION 40(3) NOTIFICATIONS

The insureds relied on two notifications made on 5 May 2015 and 14 May 2015, neither of which identified the Atlantis Towers, or the brand of ACP (Alcotex) used in its construction.

The first notification was comprised of an email, a document headed 'Lacrosse Apartments—Docklands' and an article from *The Age*. The article pointed to a wide problem by referring to an 'investigation into the building practices' of the insureds by the VBA, which would try to identify whether non–compliant ACP's had been 'used elsewhere'.

The notification also included commentary from the insureds that ACPs had been widely used in Australia for decades with 'no like product [passing] the test for combustibility,' and stated that there were discussions of a class action by the owners and residents of the Lacrosse Apartments.

The second notification included an email and a report by the MFB entitled 'Post Incident Analysis Report' in relation to the Lacrosse Tower (MFB Report).

The MFB Report stated that the MFB was not aware of any competitor ACP products (to Alucobest) which satisfied combustibility tests, and expressed a strongly held opinion by the MFB that ACPs without appropriate accreditation and certificates of conformity represent an unacceptable fire safety risk, and there was a need to prevent similar incidents (to that at Lacrosse Apartments).

The MFB Report also hyperlinked to four media reports, one of which referred to the VBA audit and said that it revealed a pattern of poor compliance with regulations and that 'buildings may be a risk to occupants in a fire situation'.

JUDGMENT

His Honour found that the insureds provided their insurers with a section 40(3) notification of facts and circumstances that gave rise to the Atlantis Claims. Relevantly, he held that the insureds' notifications identified a 'wider problem' than just an investigation into Alucobest ACPs on the Lacrosse Apartments. That problem concerned 'the use of non–compliant and unsafe [ACPs] on other buildings in Australia[1] ... for LU Simon generally and the buildings which it had constructed' and other builders who had used ACPs.[2]

When taken together with the insureds' disclosure in its proposal form that 100 per cent of its work related to high rise buildings (with no other activities undertaken in the past), the insureds conveyed a real and tangible risk to their insurers that they would face claims to rectify the ACPs used on its building projects.[3]

With the VBA having subsequently identified the ACPs on the Atlantis Tower as non–compliant with the BCA, and claims commenced against the insureds for rectification costs, there was a sufficient correspondence between the notifications and the Atlantis Claims.[4]

In arriving at his decision, Justice Jackman relied on the principles concerning the construction of section 40(3) in P*&S Kauter Investments Pty Ltd v Arch Underwriting at Lloyd's Ltd* [2021] NSWCA 136, and accepted that notification need not be given in a single document, and that the giver of notice need not have an intention to give notice of facts that may give rise to a claim under section 40(3) (*Avant Insurance Ltd v Darshn* [2022] FCA 48).

In divergence with the Federal Court's decision in *Uniting Church v Allianz*,[5] his Honour concluded that opinions expressed by public authorities (i.e. the MFB) with appropriate expertise amount to 'facts' for the purpose of section 40(3) of the ICA.[6]

His Honour also accepted that hyperlinked documents contained in a notification form part of the notification itself, observing that 'the task of clicking on a hyperlink is not significantly more demanding than turning a physical page,' provided it was to a specific page or document.

KEY TAKEAWAYS

While the outcome is heavily based on the factual circumstances of the case, it does demonstrate that the 'notification is in the details,' and is a timely reminder to insurance industry professionals to carefully consider the facts and circumstances of a notification.

The judgment emphasises the importance of insurers reviewing notifications in their entirety (including any media reports or publications) and considering them in the context of all the documents and information made available to underwriters. The task is to identify, based on the ordinary and natural meaning of the words contained in the notification documents,[7] the nature of the claim, potential claim or notified problem.

Insurers should be careful to review any materials which are hyperlinked in the notification documents and consider whether opinions expressed in notification documents are held by suitably qualified experts. This may include opinions held by the insured (or its employees) where they themselves are sufficiently qualified to provide that opinion, as those may later form 'facts' that gave rise to a claim for the purpose of section 40(3).

The judgment also demonstrates the importance of brokers continuing to make detailed notifications to insurers as soon as possible. Consideration should be given to whether any ancillary information in the form of newspaper articles, qualified opinions or industry reports can usefully supplement the substantive notification.

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1. Ibid [16].

2. Ibid [52].

3. Ibid [17].

4. Ibid [53]–[54].

5. *Uniting Church in Australia Property Trust (NSW) v Allianz Australia Insurance Ltd* [2023] FCA 190.

6. *MS Amlin Corporate Member Limited v LU Simon Builders Pty Ltd* [2023] FCA 581 at [48]–[50], [52].

7. Ibid [16].

Disclosure: David Lee and Stephanie Weeks acted for the broker of LU Simon Builders Pty Ltd and LU Simon Builders (Management) Pty Ltd.

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WHEN IS IT REASONABLE FOR A PRINCIPAL TO ENGAGE A THIRD PARTY TO RECTIFY THE CONTRACTOR'S DEFECTS AND WHAT COST TO THE CONTRACTOR—IS IT TIME FOR THE HIGH COURT OF AUSTRALIA TO INTERVENE?

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INTRODUCTION

A 'defect' may be defined as the contractor performed work or supplied material or goods not in accordance with the building contract and therefore the contractor is in breach of the building contract.[1]

The general rule is the contractor should be given the opportunity by the principal to rectify its own defects and the contractor then carry out the rectification of the defects at no cost to the principal.[2] Assuming both parties are in agreeance of what is wrong and what needs doing, this is simplest and easiest, ideally resolving the dispute.[3]

Standard forms usually contain mechanisms and some domestic building legislation imply terms for a contractor, before or after a defect liability period, at instruction of or after receiving a notice from the superintendent, to rectify the defect at no cost to the principal.[4]

Where there is otherwise a clause in the building contract that requires the contractor to have opportunity to rectify its own defects, such as to return to rectify defects in a defect liability period, it is implied the principal must afford the contractor the specified time or otherwise a reasonable time to rectify its own defects at no cost to the principal.[5]

The rationale is it is usually less expensive for the contractor (or its subcontractor), rather than a third party, to rectify the defects.[6] For example, reasonable costs of a third party may not be limited to what it would cost the contractor rectifying the defects and may carry extra costs such as:

- a premium to cover associated risk of the contractor's work such as increased hourly rates as if tendering for new work;
- inflation of price in building materials at the time of the third party (or returning subcontractors) being engaged;
- increase in price of labour such as from change in competition in the market or change in law;
- inspection(s) of the site and contract documents;
- mobilising to site including site inductions and training;
- obtaining new building permits;
- carrying out testing (e.g. destructive testing);
- obtaining expert report(s); and
- perform works beyond rectifying of defect.[7]

Where a principal affords the contractor opportunity to rectify its own defects or has complied with the contractual mechanisms before engaging a third party to rectify the contractor's defects, depending on the building contract and conduct of the parties, this may demonstrate the principal's duty to mitigate loss (i.e the principal acted with reasonableness) and entitlement to recover third party costs.[8]

With this contextual background, this paper explores the consequences to damages recoverable by a principal where a third party is engaged to rectify defects without the contractor having been afforded the opportunity to rectify its own defects or the principal has not complied with the contractual mechanisms in the building contract.

Part I (No right to common law damages) discusses the Australian cases following *Turner Corporation Ltd (Receiver and Manager Appointed) v Austotel Pty Ltd* (1997) 13 BCL 378 (*Turner*) and *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* [2009] NSWSC 1302 (*Bitannia*) that a

standard form building contract is a written 'code' that confers the rights and powers of the parties, and if the principal failed to comply with the contractual mechanism(s) then no damages are available.

In other words, there is no additional common law right to damages. The rationale is to give certainty to the contractual terms of the standard form and parties to adhere to the rights and obligations agreed upon.[9]

Part II (Rights to common law damages) discusses the Australian cases that allow damages to the principal where the contractual mechanisms are not complied with or no opportunity to rectify defects is afforded to the contractor.

In other words, there is an additional common law right to damages. The rationale is *Turner* and *Bitannia* can be distinguished or a non–standard form building contract exists which has seen courts apply the duty to mitigate (i.e. reasonableness of the principal's conduct) to entitle reasonable costs whether that is third party costs, diminution in value caused by the defective workmanship, what it would cost the contractor to rectify the defects or another amount of damages.

Part III (The English approach) contrasts the Australian case law of Part I and Part II with the English case law. In England the case law applies to informal contracts and standard form (no legislative contract exists). There is an additional common law right to damages which needs clear words to remove. Where the principal does not afford the contractor opportunity to rectify its own defects, the general position is that damages be reduced to what it would have cost the contractor to rectify its own defects, which needs express words to change. In English courts the duty to mitigate is discretionary but has established categories of when the principal has acted reasonably and unreasonably.

The paper concludes by comparing Parts I and II with Part III and argues that *The Owners—Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067 (*Di Blasio*) and *Cassidy v Engwirda Construction Co (No 2)* [1968] Qd R 159 (*Cassidy*) should be adopted by the High Court of Australia as the preferred position for all building contracts.

In other words, case law to apply to standard forms, bespoke contracts, legislative contracts and informal contracts. There be additional common law right to damages, but this may be varied by express words. Where the principal does not afford the contractor opportunity to rectify its own defects, the general position be damages reduced to what it would have cost the contractor to rectify its own defects, which needs clear words in the building contract to change. The principal's duty to mitigate (reasonableness) becomes discretionary where the court may consider all the circumstances but have established categories of when the principal has acted reasonably and unreasonably, to provide a degree of certainty.

DEFINITIONS

Bespoke Contract: A written contract, drafted for the specific project or transaction most often by a legal practitioner—the opposite of a standard form contract.[10]

Building Contract: Any bespoke contract, informal contract, legislative contract, or standard form used in the jurisdiction.

Informal Contract: Oral or written with limited terms often not drafted by a legal practitioner—not a standard form or bespoke contract. Commonly can be limited terms set out in oral representations, site meeting minutes, plans, specifications, written invoice, or cost plan.

Legislative Contract: Where domestic building legislation creates a domestic building contract between the builder and an owner, subsequent owner or owners corporation which can contain terms such as implied warranties and is subject to applicable limitation periods.[11]

Standard Form Contract: Published contract for aspects of construction work (B2B or B2C). Widely used in practice, though always capable of being modified for a specified project, e.g. AS, ABIC, JCT—the opposite of bespoke contract.[12]

NO RIGHT TO COMMON LAW DAMAGES

In light of *Turner* and subsequent authorities, a principal who has a standard form must follow any, express or implied, contractual mechanism that may power or oblige a contractor to have opportunity to rectify defects and to only engage a third party and seek to recover costs of rectification for the defects from the contractor after compliance with the relevant contractual mechanism(s).[13]

If the principal fails to follow the contractual mechanisms and does not fall within limited exception (see Part II below), the Australian courts say the principal will not be entitled any damages.

The express contractual mechanism are obvious in they provide procedure to enable a principal to engage a third party to rectify defects of a contractor which usually have two stages: where the contractor has been given an instruction or notice to rectify defective work at no cost to the principal and then a failure to comply with the instruction or

notice, usually within a specified or reasonable time, permits the principal to engage a third party to rectify the defective work and recover costs from the contractor.

The implied contractual mechanisms are derived from clauses that may be read to imply the contractor an opportunity to rectify its defects but do not expressly deal with whether a third party may be engaged. In these clauses courts have determined it is implied the contractor is to be given notice and a specified time or a reasonable time before a third party is engaged.

A common clause with this implied right is the clause that permits the contractor to return during the defects liability period.[14] Depending on the wording of the building contract, this may extend to other less obvious clauses and in the cases below has been extended to a termination and final payment claim clause.[15]

Standard forms the 'same or materially the same' to the JCCA 1985 with Quantities in *Turner* have followed this case law, which to date include the JCC–D 1994 without Quantities (*Bitannia*), ABIC SW–2008 *Bedrock Construction and Development Pty Ltd v Crea* [2021] SASC 66 (*Bedrock*) and AS 4902–2000 *Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd* [2023] NSWSC 178 (*Parkview*). The cases are below.

JCCA—*TURNER CORPORATION LTD (RECEIVER AND MANAGER APPOINTED) V AUSTOTEL PTY LTD* (1997) 13 BCL 378[16]

The court carried out a comprehensive review of a 'Domestic Building Works Contract—JCCA 1985 with Quantities', and established three avenues in the standard form a principal could seek the defective works of a contractor to be performed by others:

… the contract permits the proprietor to bring the works the subject of the contract with the builder to completion by specifying defects and requiring the builder to rectify them. If it fails to do so, after a second appropriate notice requiring rectification within a specified time, the proprietor may then engage others to complete the works with the cost being recoverable or deductable from the builder. Alternatively the builder may by agreement exclude rectification works from the contract pursuant to Cl10.28. If neither of the latter two courses are adopted and there remained outstanding unrectified notified defects, the proprietor may, by appropriate notice, terminate the builder's employment under the contract and may thereafter exercise the powers pursuant to Cl12.05 to achieve completion, substantially at the builder's cost.[17]

The principal did not use these contractual mechanisms before engaging a third party to rectify the defects and the court held this meant there was no entitlement to recover cost of the rectification work performed by a third party from the contractor.[18]

The court reasoned:

… it also follows, in my view, no room for a wider common law right in the proprietor to treat non compliance with the contractual obligation by the builder as a separate basis for claiming damages being the cost of having a third party rectify or complete defective or omitted works. That is because the contract specifies and confers upon the proprietor its rights flowing from such breach; that is, the parties have, by contract, agreed upon the consequences to each of the proprietor and the builder, both as to rights and powers flowing from and the consequences of, such breach …

… the proprietor has no entitlement to recover the costs of work performed by others at the request of the proprietor unless prior to such work being performed the architect has given the notice required …[19]

The court recognised the common law right to damages requires clear words to be contractually removed, but was of the view clear words existed:

I do not doubt that concept, however, it does not mean that express words are required. If on the proper construction of the contract as a whole, it can be said that a party has surrendered its common law right to damages, that construction must be given effect to, notwithstanding absence of express words surrendering the common law right to damages.[20]

JCC—*BITANNIA PTY LTD V PARKLINE CONSTRUCTIONS PTY LTD* [2009] NSWSC 1302[21]

Turner was followed in *Bitannia* under a 'JCC–D 1994 without Quantities'.[22]

Clause 6.11 provided instructions for the contractor to rectify defects in the defects liability period which the architect could require the making good of defects regardless of if the materials and workmanship were in accordance with the building contract, but if the materials and workmanship were in accordance with the building contract, then it would be a variation.[23]

The contractor submitted clause 6.11 was a code determining the rights and obligations of both parties in respect of the making good of defective work, relying on *Turner*. The principal submitted clause 6.11 did not constitute clear words to remove all remedies (e.g. common law remedies) available for breach of contract.[24]

The court decided *Turner* considered clauses 'the same or materially the same' as this

standard form[25] and since *Turner* was a decision intended to give certainty to standard forms the court would follow *Turner* unless satisfied 'clearly wrong', which the court was not.[26]

The court held defects rectified by the third party were not done in mitigation of loss or the principal's expenditure was caused by the contractor's breach of contract. Rather, the engagement of the third party and principal's expenditure was as a result of its own repudiation and its determination to have building works done to a different standard than required in accordance with the standard form.[27]

ABIC—*BEDROCK CONSTRUCTION AND DEVELOPMENT PTY LTD V CREA* [2021] SASC 66[28]

Turner was again followed in *Bedrock* under a 'Simple Works Contract—ABIC SW–2008'.

Clause M11 required the contractor to 'correct defects … whether before or after practical completion' within the agreed time as stated in an instruction or if no time stated, within 10 days after receiving a written instruction to do so.[29] Clause M13 provided for a six month defect liability period and clause M14 obliged the contractor to rectify any defects or incomplete necessary work during and in some circumstances after, the expiry of the defects liability period.[30]

The contractor submitted no opportunity was given by the principal to complete or rectify the defects before a third party was engaged to carry out defects.[31]

The court decided clause M12 only purported to entitle the principal to claim the cost of third party rectification of defects where the contractor had failed to correct or complete work within the nominated time under clause M11.[32]

The court found the same reciprocity of obligation and opportunity was implicit in the operation of clause M14 during or after the defects liability period.[33] This meant entitlement in the standard form for the contractor to promptly correct or finalise the work. The court then considered and adopted *Bitannia* and *Turner*:

… the contractual opportunity of at least 10 working days to rectify defects was not, either expressly or impliedly, constrained by any notion of reasonableness. The owner, Mr Crea, was required to afford the builder this contractual opportunity to rectify in order to be entitled to recover damages referable to the cost of a third party to rectify the defects. It was not enough that the builder was afforded some other 'reasonable' opportunity. I do not think there is any room, in the face of the express contractual provisions for addressing defects, for the existence of some wider common law right to recover damages of that nature. Such a right would cut across the contractual regime agreed between the parties.[34]

The court held the owner did not establish entitlement to recover the cost of the third party rectifying the defects from the contractor.[35]

AS—*PARKVIEW CONSTRUCTIONS PTY LTD V FUTUROSCOP ENTERPRISES PTY LTD* [2023] NSWSC 178[36]

Turner was followed in *Parkview* under an amended 'AS 4902–2000'. The question on appeal was whether clauses 29.3 (defective work), 35 (defect liability period) and 37.4 (final payment claim) of the standard form was code governing rights, obligations and liabilities of the parties, to apply *Turner*.[37]

The court held these clauses established a regime 'indistinguishable' from *Turner* and *Bitannia*.[38] The court decided under clause 35 the principal

The general rule is the contractor should be given the opportunity by the principal to rectify its own defects and the contractor then carry out the rectification of the defects at no cost to the principal.

was entitled to have rectification works carried out by others if the contractor did not rectify a defect by the date directed by the superintendent.[39]

The standard form also envisaged that a final certificate would be later issued at which time any other rights and remedies which the principal may have against the contractor for failing to rectify defects in accordance with the superintendent's direction would fall under.[40]

The court concluded this meant by clear words the principal had surrendered its common law right to damages.[41]

RIGHTS TO COMMON LAW DAMAGES

Cases have developed to consider the principal's duty to mitigate (reasonableness) either to distinguish *Turner* or have developed where *Turner* has not applied, in informal contracts and legislative contracts, which has allowed the principal after engaging a third party to rectify defects of the contractor without having afforded opportunity to rectify its defects, to have common law rights to damages.

Given the possibility of *Turner* excluding common law rights, it has been common to include a clause, similar to that in default provisions, making clear that such an exclusion is not intended.[42]

Hacer Group Pty Ltd v Euro Façade Tech Export SDN BHD [2022] VSC 373 was such a case, and the first exception is where general indemnities can be used to distinguish *Turner*. Whilst the case was a bespoke contract, it also applies to standard forms.

The next two cases are where *Turner* has also been acknowledged by courts as distinguished for standard forms in circumstances where the contractor is incapable of rectifying the defects (*Hughes v Dormley Pty Ltd as Trustee for the Poll Family Trust* [2001] WASC 83) (*Hughes*) or the contractor has repudiated the building contract (*Cassidy*).

With the introduction of legislative contracts, courts have used this as a vessel to introduce the duty to mitigate (reasonableness) and rights to common law damages for the principal (*Di Blasio*). This has extended into informal contracts and will apply to standard forms only where the principal has made a clear election between the contractual mechanism and the statutory warranty (*Bitannia*).

The position taken by the court in *Di Blasio* is to view reasonableness looking at all the circumstances of the case. The court recognises a principal may have acted unreasonably where the contractor is not given the opportunity to rectify its own defects; or access to the property by the principal after the defect liability period to rectify the defects.[43]

The court recognised a principal may have acted reasonably (even where not giving opportunity or notice to the contractor to rectify defects) including where considering the attempts the contractor has made to repair and, in light of the contractor's conduct, the principal reasonably lost confidence in the willingness and ability of the contractor to do the work; contractor has repudiated the building contract by refusing to conduct any repairs, unsatisfactory work or dilatoriness.[44]

Damages for all the cases were assessed per *Bellgrove v Eldridge* [1954] 90 CLR 613 (*Bellgrove*): reasonable costs of contractual breach except to the extent unreasonable. However, they had different outcomes depending on the case circumstances. The cases which are exceptions to *Turner* are discussed below.

'EXPRESS WORDS' LIKE GENERAL INDEMNITIES

HACER GROUP PTY LTD V EURO FAÇADE TECH EXPORT SDN BHD [2022] VSC 373[45]

Hacer involved a bespoke contract based on the AS standard form. The contractor engaged a third party to rectify façade defects and sought its reasonable costs from the subcontractor.

The subcontract included terms requiring the contractor to give notice to the subcontractor of defects or direct the subcontractor to rectify them and only if the subcontractor had failed to do so, then the contractor was entitled to engage a third party to execute the work required and recover the costs incurred as debt due to the contractor by the subcontractor.

The subcontractor alleged the contractor never issued a notice before carrying out rectification works and relied on *Turner* as a defence to paying the third party's rectification costs incurred by the contractor.

The court distinguished *Turner* on the basis there were broad general indemnities in favour of the contractor in the standard form that permitted common law rights to damages and an absence of clear words excluding the subcontractor's liability meant the contractor was entitled to rely on its common law right to damages even where it had not complied with contractual mechanisms governing the notification and rectification of defects.[46]

The court found lack of notice could be addressed by applying the principles of mitigation of loss and limited the contractor's rectification costs to the amount it would have cost the subcontractor to have attended the rectification.[47]

In *Parkview*, the court acknowledged *Hacer*, that detailed indemnities permit a principal to rely on its common law right

to damages even if it had not complied with the contractual regime governing the notification and rectification of defects.[48]

THE CONTRACTOR NOT CAPABLE OF REMEDYING DEFECTS

HUGHES V DORMLEY PTY LTD AS TRUSTEE FOR THE POLL FAMILY TRUST [2001] WASC 83[49]

The principal issued a notice of default and later a notice of termination on grounds defects in the works were 'so grave that the owner wished to terminate the contract if the builder failed to make them good'.[50] The contractor contended it was ready, willing and able to proceed and accepted the notices as repudiation by the principal and terminated the building contract.[51]

On first instance the arbitrator, after analysing the notices and conduct of the parties, concluded the project was simply beyond the capabilities of the contractor and awarded damages in favour of the principal for diminution in value of the works caused by the defective workmanship of the contractor, finding:

In the building of this fairly unique residence there was a need for a very experienced builder with a high level of fine carpentry experience and an intention to involve himself on a day to day basis with work on site. The only alternative to a builder with those qualifications and intentions would have been a full time site foreman (in the true sense of the title) of the same ilk. It was blatantly obvious that such was not the case in the building of this residence.[52]

On appeal the contractor submitted the contractual mechanism contemplated the contractor must first be given the opportunity to remedy defects before the principal was entitled to engage a third party and the principal had deprived the contractor of this opportunity by repudiating, relying on *Turner*.[53] The principal submitted the contractor would not have been capable of improving the position if left to its own devices and it was necessary if the work was to be made good to bring in a competent contractor capable of devoting considerable time.[54]

The court distinguished *Turner* in it did not contemplate a contractor unable to complete the works or remedy defective workmanship or materials[55] and in such circumstances could not be said the contractor was unfairly disadvantaged by not being able or permitted to carry out the rectification of the faults given the contractor was not capable of remedying the defects.[56]

For damages the court accepted the arbitrator's decision, it was reasonable for the principal to be awarded an amount of diminution in value of the works caused by defective workmanship.[57]

The court in *Bitannia* acknowledged *Hughes* entitles a principal to terminate the building contract where a contractor is not capable of remedying the defects.[58]

THE PRINCIPAL MAKES CLEAR ELECTION TO CLAIM DEFECTS UNDER LEGISLATIVE CONTRACT INSTEAD OF STANDARD FORM

BITANNIA PTY LTD V PARKLINE CONSTRUCTIONS PTY LTD [2009] NSWSC 1302

In *Bitannia*, the principal submitted that alternative to the standard form their entitlement to recover costs of a third party rectifying the contractor's defects was under a legislative contract because the domestic building legislation void any clause that restricts or removes the rights of a statutory warranty.[59]

The court accepted it was open to the principal to seek damages for defective work as a result of the statutory warranty in a legislative contract, notwithstanding the principal did not pursue the contractual mechanism for the notification under clause 6.11 of the standard form.[60]

However, to do so the court required the principal to distinguish between defects pursuant the standard form and the legislative contract. If the defective or incomplete works was included in a list of defects pursuant to clause 6.11 the contractor was both obliged and entitled to do the work.[61]

The court held the principal had not identified the precise nature and extent of the defective work which the contractor was liable by reason of a breach of statutory warranty, as opposed to the lists of defects, and therefore had no entitlement to damages.[62]

THE CONTRACTOR HAS REPUDIATED THE BUILDING CONTRACT

CASSIDY V ENGWIRDA CONSTRUCTION CO (NO 2) [1968] QD R 159[63]

In *Cassidy*, a subcontractor was engaged by a contractor to perform works under an informal building contract. The subcontractor sought payment for work performed whilst the contractor alleged the subcontractor repudiated the building contract as it did not execute in a proper and workman like manner, requested payment in a timeframe not entitled to and then ceased work and refused to complete work following non–payment which led the contractor to engage a third party to complete work.

Part of the trial concerned if the contractor was entitled to claim the costs of the third party to rectify defects arising from the

Given the possibility of *Turner* excluding common law rights, it has been common to include a clause, similar to that in default provisions, making clear that such an exclusion is not intended.

subcontractor's repudiation. The trial court provided the following relevant passage:

… in absence of express provision in the contract the remedies under maintenance defects clauses are in addition to and not in substitution for common law rights … and that, even where the defects have appeared within the period, the employer may sue for damages rather than call on the contractor to do the work … subject in that event to the employer damages being limited to the cost to the contract of doing the work at that time, rather than the possibly greater cost of bringing in another contractor either then or at a later date …

When a builder is actually working on a job it will ordinarily be cheaper for him to remedy defects rather than to have them remedied by some other contract. In such a case it is clear that a building owner must generally give the original contractor the opportunity to rectify the defects unless, I should say, there is some good reason to the contrary. Again, depending upon the particular terms of the contract, ordinarily the builder should have had the opportunity of remedying defects during a defects liability period. However, it seems to me that if the circumstances are such that it is not reasonable to require the building owner to give notice to the builder, then he is able to recover his proper cost of restoring the defects even though he has given no notice …[64]

The trial court held in the circumstances the contractor was entitled to engage a third party to rectify defects without notice and nothing suggested the cost of rectifying the defective work would have been less if performed by the contractor. The subcontractor had repudiated the building contract, and the contractor was entitled to its damages.

The appeal court only considered part of the project and the issue of repudiation. After citing various case law and text books in relation to repudiatory conduct, the court upheld the subcontractor repudiated the building contract and had no grounds for damages from the principal.[65]

The effect of *Cassidy* according to Cremean, Whitten and Sharkey in *Brooking*[66] is broader the opposite interpretation to *Turner*:

It is possible that a lack of notice of a head contractor to a subcontractor will prevent recovery of damages where the contract can be construed as imposing an obligation only to remedy defects that are notified; but contracts where that construction is open would seem rare. See Cassidy.[67]

WHERE COMMON LAW APPLIES

THE OWNERS—STRATA PLAN NO 76674 V DI BLASIO CONSTRUCTIONS PTY LTD [2014] NSWSC 1067[68]

In *Di Blasio*, the owners corporation had a legislative contract with the contractor and sought damages to rectify defects under statutory warranties. The contractor provided an offer to return to rectify defects and relied mostly on the owners corporation rejection of this offer as a failure to mitigate loss and in pleadings rejected the defects entirely.

The court set out relevant legal principles which the court in *Bedrock* determined only applied where the common law applies,[69] summarised below:

- a person who suffers loss as a consequence of breach of contract is required to act reasonably in relation to that loss for it to be recoverable (duty to mitigate loss);
- onus is on the defendant to prove the plaintiff acted unreasonably (which does not end once court proceedings commence);

• generally a principal must give the contractor an opportunity to rectify defects to minimise the damage it must pay (since it may be less expensive for a contractor rather than a third party to rectify the defects which may be part of the duty to mitigate) except where the refusal is reasonable or where the builder has repudiated the contract by refusing to conduct repairs;[70] and

• to assess what is reasonable requires looking at all the circumstances of the case including what attempts the contractor has made to repair the defects in the past (including if it is unsatisfactory work or dilatoriness) and whether, in the light of the builder's conduct, the owner has reasonably lost confidence in the willingness and ability of the builder to do the work.[71]

The court did not accept the submission of the contractor, finding in favour of the principal on complex factual grounds, which in summary:

• the defects were significant;

• inadequate attempts to repair defects were done by the builder for patent defects;

• the contractor was unreasonable in not carrying out repairs of all defects identified in the principal's expert reports;

• the principal took reasonable steps to engage an expert to identify defects and took a reasonable position that the contractor should prepare scope of works to remedy all defects;

• the contractor maintained it was not willing to rectify the defects and defended the proceedings on the basis it was not liable; and

• expert report of contract in the court proceedings was substantially supportive to the owner's expert report;[72]

On quantification of damages the court assessed the expert reports of both parties and allowed for the principal to recover the reasonable costs to carry out the repair of defects plus certain preliminaries and contingencies in its expert report.[73]

ENGLISH APPROACH

The English courts have adopted law that applies to both standard form and informal contracts. There is no legislative contract in England.

There is a flexible approach to reasonableness when considering if a principal can engage a third party to rectify defects of the contractor looking at all the circumstances of the case. The decisions have interpreted the JCT Suite and informal contracts. The JCT Suite has an implied contractual mechanism for a third party to be engaged to rectify defects of the contractor.

English courts recognise a principal may act unreasonably where the contractor is not given the opportunity to rectify its own defects[74] or access to the property in the defect liability period to rectify the defects.[75]

The courts recognise a principal may act reasonably where not giving opportunity to the contractor to rectify defects where whole scale defects,[76] fraudulent behaviour,[77] past history of unsatisfactory work,[78] dilatoriness,[79] no enforceable guarantees,[80] and refusal or lack of willingness of the builder to return to rectify defects.[81]

The courts have expressed hesitance to interpret a building contract to vary ordinary rights or obligations of the parties at common law and for it to be accepted requires 'very clear words'.[82]

The standard position for where a contractor is not afforded the opportunity to rectify its own defects before a third party is engaged is reduction to what it would have cost the contractor to remedy the defects.[83] Consequential damages are available regardless of opportunity being afforded to the contractor.[84]

The courts recognise the assessment of damages can be varied by contract law with 'express words' or where reasonableness suggests otherwise.[85]

The English case law for a contractor's entitlement to rectify its own defects and a principal to engage a third party, and the courts position on reasonableness and quantum of damages where no opportunity is afforded to the contractor, is outlined below.

PEARCE & HIGH LIMITED V BAXTER **[1999] EWCA 789[86]**

The principal entered a 'JCT Form for Minor Building Works'. A question arose of the damages the principal was entitled to for the contractor's defects rectified by third parties.

This involved an assessment by the court of the construction and effect of clause 2.5 of the JCT form, particularly the wording:

... any defects, excessive shrinkages or other faults which appear within months [6] of date of practical completion … shall be made good by the contractor entirely at his own cost unless the architect shall otherwise instruct.[87]

The court agreed with *P&M Kaye Ltd v Hosier & Dickinson Ltd* (1972) 1 WLR 146 (*P&M Kaye*)[88] giving a notice of defects to a contractor was a condition precedent to the principal's right to require compliance in clause 2.5[89] and 'can be regarded as giving the contractor a right to make good the defects at his own expense, and a license to enter the property for that purpose'[90] and this was only if the contractor was 'willing to do so'.[91]

The contractor's right to return to rectify defects was subject to *Hudsons Building and Engineering Contracts* (11th ed.) para 5–051 (*Hudson* 11th), however, this was 'not concerned in the present case'.[92] The relevant passage of *Hudson* reads:

It is suggested however that this latter view fails to take account of the not uncommon case of an owner who, by reason of a past history of unsatisfactory work or dilatoriness, may have reasonably lost confidence in the contractor's willingness or ability to remedy the defects satisfactorily and who therefore reasonably prefers to bring in another contractor.[93]

Satisfied there were defects in the case, the court considered the rights the principal gained to remedy the breach of building contract by the contractor:

… a right to recover damages, but they would have no right to require the contractors to rectify the defect, apart from the theoretical and speculative possibility that in certain circumstances the court might order specific performance.[94]

Considering damages as the common approach, the court assessed the quantum of damages that a principal may recover, giving consideration to both if the contractor rectified its own defects and where denied its right to rectify defects:

… if the contractor does repair the defects, then no loss will be suffered, apart possibly from consequential losses… if he does not, then the measure of loss will be the cost to the employer of having the defect repaired, unless in special circumstances diminution in value of the property in question is appropriate. The cost of employing a third party repairer is likely to be higher than the cost to the contractor of doing the work himself would have been so the right to return in order to repair the defect is valuable to him. The question arises whether, if he is denied that right, the employer is entitled to employ another party and to recover the full cost of doing so as damages for the contractor's original breach … in my judgment the contractor is not liable for the full cost of repairs in those circumstances. The employer cannot recover more than the amount which it would have cost the contractor himself to remedy the defects. Thus, the employer's failure to comply with clause 2.5, whether by refusing to allow the contractor to carry out the repairs or by failing to give notice of the defects, limits the amount of damage which he is entitled to recover.[95]

The court not only considered the actual loss, but any consequential loss that followed from the contractor's breach of contract, citing the speech of Lord Diplock in *P&M Kaye*:

At common law a party to a contract is entitled to recover from the other party consequential damage of this kind resulting from that other party's breach of the contract, unless by the terms of the contract itself he has agreed that such damage shall not be recoverable. In the absence of express words in the contract a court should hesitate to hold that a party had surrendered any of his common law rights to damages for its breach, though it is not impossible for this to be a necessary implication from other provisions of the contract.[96]

The court considered whether clause 2.5 of the JCT standard form excluded the principal's ordinary right to damages for breach of contract, adopting *William Tomkinson and Sons Ltd v The Parochial Church Council of St Michael* [1990] CLJ 319 (*William Tomkinson*):

It requires very clear words to debar a building owner from exercising his ordinary rights of suing if the work is not in accordance with the contract … clause 2.5 is not such a provision.[97]

WOODLANDS OAK LIMITED V CONWELL AND ANOR **[2011] EWCA CIV 254[98]**

The principal engaged the contractor in an informal contract of work plus five per cent in which defects for snagging items and roofing arose.

The County Court held the principal was aware of the snagging items but did not notify contractors, and contractors had the resources to rectify them but were not given the opportunity, therefore the principal failed to mitigate their losses and were only entitled what it would cost for the contractor to rectify the defects.

The Court of Appeal considered if the County Court erred not to award the principal their agreed costs to rectify the snagging items because of a failure to notify the builder to give the opportunity of rectifying them.[99]

The Court of Appeal clarified the law where a principal fails to give the contractor an opportunity to rectify defects in the work only 'may' amount to a failure to mitigate the losses as opposed to 'will' amount to a failure to mitigate losses[100] and upheld the County Court decision for snagging items:

… the consequences of not giving the opportunity to the contractor to rectify defect, when for one reason or another should have been given that opportunity, would be that the defendants are not entitled to recover more than the amount it would have cost the claimant to rectify the defects. That is a proposition which applies just as much to a contract with an express defects liability clause as it does to consideration, which I am satisfied

that the Recorder was undertaking, of whether or not the Conwells had failed to mitigate their loss.[101]

The Court of Appeal in forming this judgment elaborated on when there 'may well be circumstances in which it is entirely reasonable not to give the contractor that opportunity'[102] agreeing with the County Court finding for the roofing defect, which was:

The defendants do intend to repair their roof. Although anxious to ensure that the job was done within their means I am satisfied that they would not want to leave the family home with an unsatisfactory roof. Although I consider that Mr Whitehorn's offer to repair was genuine I do not consider that the defendants acted unreasonably in refusing it. Past experience of Mr Whitehorn's roofers and no enforceable guarantee justifies an insistence on third party contractors.[103]

MUL V HUTTON CONSTRUCTION LIMITED [2014] EWHC 1797[104]

The principal engaged the contractor under a 'JCT Intermediate Form of Contract'. Clause 2.30 contained a rectification period for 12 months following practical completion, or, if the principal consents and the contract administrator 'so otherwise instruct' and such defects are not put right, 'appropriate deduction being made'.[105]

There were defects in multiple areas of the house with over £1 million rectification cost which were or would be carried out by third parties at the time of the proceeding. The defects had been notified by the contracts administrator at a site meeting, correspondence, then finally by letter to the contractor with a note that to avoid further argument and mitigate the principal's financial consequences, third parties were to be engaged.[106]

The letter also identified other defects in an inspection at the end of the defect liability period and sent by a snagging list which were annexed to the letter, which also were to have third parties engaged.[107] The contractor responded by letter denying it had prevented the principal's occupancy and all defects.[108]

The issue in the proceedings was if the contract administrator's letter was an instruction and if the principal would only be entitled to 'appropriate deduction' under clause 2.30.[109]

After considering *William Tomkinson*, *P&M Kaye*, *Pearce & High*, and *Woodlands Oak*, the court distinguished the cases on the basis of 'clause 2.30 and its talk of an appropriate deduction being made where the employer consents and the CA instructs that the making goods is not to be done by the contractor'.[110]

The High Court did not agree the contract administrator's letter was an instruction. Nor agree clause 2.30 explicitly excluded or limited right to damages. The court held the principal was entitled to damages for defects that were the contractor's fault, subject to a duty to mitigate.[111]

The High Court reasoned the express words 'appropriate deduction being made' is a 'neutral term' meaning 'a deduction which is reasonable in all the circumstances'.[112]

The court further held the:

... appropriate deduction … can be calculated by reference to one or more of the following, amongst other factors:

(a) the contract rates/priced schedule of works/specification; or

(b) the cost to the contractor of remedying the defect (including the sums to be paid to third party subcontractors engaged by the contractor); or

(c) the reasonable cost to the employer of engaging another contractor to remedy the defect; or

(d) the particular factual circumstances and/or expert evidence relating to each defect and/or the proposed remedial works'.[113]

The High Court in *obiter dicta* contemplated if the case was an informal contract on what rights exist for the contractor to come back and remedy culpable defects, like in *Woodlands Oak*:

… the usual rules about damages would apply such as causation, remoteness, foreseeability and mitigation of damage. It will often be the case that the employer can be said to have failed to mitigate his or her damage if he or she fails to give the contractor opportunity to put right the breaches of contract, namely culpable defects in question. However, it is not invariably the case the employer would have failed to mitigate damage in failing to give the contractor this opportunity, examples might be where there were such whole scale defects that no reasonable employer could be expected to have that contractor back on site, where there had been fraudulent behaviour on the party of the contractor relating to the works or where the contractor had made it clear it was not prepared to return to put right alleged defects; it all depends on the facts and the circumstances. Assuming that remedial works were the proper basis of an award of damages, the appropriate damages would be related to the reasonable cost to the employer of the remedial works and employing other parties to do them, unless he or she had failed to mitigate by not offering the opportunity to the contractor to put right the defects in question, in this latter case, the employer would be limited to what it would have cost the contractor

to put them right (this cost often being significantly less than that of bringing in new contractors or tradesman to do so).[114]

The High Court acknowledged where a principal has acted unreasonably in not giving the contractor a fair opportunity to put right the defects then that would be a failure to mitigate loss.[115] Additionally the court found *William Tomkinson*, *Pearce & High* and *Woodlands Oak* all point to the principal being limited to what it would have cost the contractor to effect the requisite remedial works for defects which it was, unreasonably on the principal's part, not given the opportunity to put right.[116]

CONCLUSION

The complexity of the case law in Australia as it currently stands as demonstrated in Parts I and II can be visualised by this table:

Summary of Australian Case Law

Case	Type of Contract	Reasonableness	Damages
Turner *Britannia* *Parkview* *Bedrock*	Bespoke and Standard Form—AS, ABIC, JCC, JCA and any 'same or substantially similar'	None. Applies when contractual mechanisms have not been complied with which includes any provisions that entitle a contractor to rectify defects such as for defective work, in a defect liability period, payment terms and termination.	No damages.
Hacer	Bespoke and Standard Form	Express words like general indemnities have been inserted into the standard form which retain common law rights (and no clear words excluding the other sides liability exist).	Costs of contractual breach except to the extent unreasonable per *Bellgrove*. Allowed principal what it would have cost the contractor to perform the work.
Hughes	Bespoke and Standard Form	Contractor was not capable of remedying defects.	Costs of contractual breach except to the extent unreasonable per *Bellgrove*. Allowed principal the diminution in value of the works caused by defective workmanship.
Cassidy	Bespoke and Standard Form	Contractor repudiated the contract and the principal elected to terminate.	Costs of contractual breach except to the extent unreasonable per *Bellgrove*.
Bitannia	Legislative Contract	Principal makes a clear election to claim defects under implied warranties of the legislative contract as distinguished from the contractual mechanism in the standard form.	Costs of contractual breach except to the extent unreasonable per *Bellgrove*. No damages in case.
Di Blasio	Informal and Legislative Contract (where common law applies)	• Contractor's past conduct such as history of attempts to repair the defects, unsatisfactory work or dilatoriness, the principal has reasonably lost confidence in the willingness and ability of the contractor to do the work; or • Principal's refusal is reasonable or where the contractor repudiated the building contract by refusing to conduct any repairs.	Costs of contractual breach except to the extent unreasonable per *Bellgrove*. Allowed the rectification costs in principal's expert report plus certain preliminaries and contingencies.

This may be juxtaposed with a summary of English case law in Part III which visually this table demonstrates the simpler case law.

Summary of English Case Law

Case	Type of Contract	Reasonableness	Damages
Pearce & High *Woodlands Oak* *Mul*	Standard Form or Informal Contract	Principal may act unreasonably where the contractor is not given the opportunity to rectify its own defects or access to the property in the defect liability period to rectify the defects. Principal may act reasonably where not giving opportunity to the contractor to rectify defects where whole scale defects, fraudulent behaviour, past history of unsatisfactory work, dilatoriness, no enforceable guarantees; and refusal or lack of willingness of the builder to return to rectify defects.	Where contractor is given opportunity to rectify its defects then 'appropriate deduction' or reasonable costs of the third party, subject to reasonableness. Where contractor is not given opportunity to rectify its defects then the damages will be capped at what it would have cost the contractor to rectify its defects. Consequential loss available regardless of opportunity afforded to the contractor unless excluded by express words.

Australia would benefit from adopting the trial court's decision in *Cassidy* which has support in *Brooking*, and expanding the decision of *Di Blasio* into standard forms. This hybrid approach would align with the English law in Part III, which has also been adopted in other international jurisdictions.[117]

There would be additional common law right to damages, but this may be varied by express words. The court would have discretion as to the reasonableness but should adopt the defined categories already established to provide a degree of certainty.

Damages should follow *Bellgrove* but also adopt already established cases. The decision should be made by the High Court of Australia to apply to all building contracts. The proposed model for Australian law in the future is visualised in this table:

Proposed Australian Case Law (Hybrid of *Cassidy* and *Di Blasio*)

Case	Type of Contract	Reasonableness	Damages
N/A	Standard Form, Informal Contract, Bespoke or Legislative Contract	Discretionary reasonableness in the principal's conduct but defined categories below. Principal may act unreasonably where the contractor is not given the opportunity to rectify its own defects or access to the property in the defect liability period to rectify the defects. Principal may act reasonably where contractor's past conduct such as history of attempts to repair the defects, unsatisfactory work or dilatoriness, the principal has reasonably lost confidence in the willingness and ability of the contractor to do the work; or where the contractor repudiated the building contract by refusing to conduct any repairs.	Where contractor is given opportunity to rectify its defects then costs of contractual breach except to the extent unreasonable per *Bellgrove*. Where the contractor is not given opportunity to rectify its defects then the damages will be capped at what it would have cost the contractor to rectify its defects: *Di Blasio*, *Hacer*. Where diminution of value caused by the defective workmanship is appropriate: *Hughes*. Consequential loss available regardless of opportunity afforded to the contractor unless excluded by express words.

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2. *The Owners—Strata Plan No 76674 v Di Blasio Constructions Pty Ltd* [2014] NSWSC 1067, [44] (per Ball J) (*Di Blasio*); *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2010) 26 BCL 335 (White J) (*Bitannia*); *Hacer Group Pty Ltd v Euro Façade Tech Export SDN BHD* [2022] VSC 373, [30(f)] (per Stynes J) (*Hacer*); *P&M Kaye Ltd v Hosier & Dickinson Ltd* (1972) 1 WLR 146, 166 (per Lord Diplock) (*P&M Kaye*); *Pearce & High Limited v Baxter* [1999] EWCA 789, [14] (per Lord Justice Evans with Lord Justice Tucker and Justice Hidden agreeing) (*Pearce & High*); *Mul v Hutton Construction Limited* [2014] EWHC 1797, [25] (per Justice Akenhead) (*Mul*).

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5. *Bedrock Construction and Development Pty Ltd v Crea* [2021] SASC 66 at [121] and [130] (per Doyle, Livesey and Bleby JJA) (*Bedrock*).

6. *Hacer* [30(f)]; *Di Blasio* [44]; *Turner Corporation Ltd (Receivers and Managers appointed) v Austotel Pty Ltd BC9402557*, [22] (per Cole J) (*Turner*); *Mul* at [25]; *Pearce & High* at [24] (per Lord Justice Evans).

7. *Clarke v Boehm (Building and Property)* [2015] VCAT 1879, at [25] (per Senior Member E Riegler), *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd trading as AK Properties Group ABN 62 971 068 965* [2023] NSWSC 343, [285]–[288] (per Stevenson J); *Heavy Plant Leasing Pty Ltd (In Liquidation) v McConnell Dowell Constructors (Aust) Pty Ltd (No 2)* [2022] NSWSC 1775, [467] (per Stevenson J).

8. *Di Blasio* at [44]; *Hacer* at [45] citing *Bellgrove v Eldridge* [1954] 90 CLR 613; *Bedrock* at [121] and [130]; *Mul* at [25]; *Woodlands Oak Limited v Conwell & Anor* [2011] EWCA Civ 254 (*Woodlands Oak*), at [20] (per Lord Justice Richards and Lord Justice Hughes); *P&M Kaye* at [166]; *Pearce & High* at [23]–[24] (per Lord Justice Evans).

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13. I Bailey, [9.740].

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15. *Turner*, n13 at [34]; *Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd* [2023] NSWSC 178, at [258] and [260] (per Rees J) (*Parkview*).

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17. *Turner*, n13 at [34].

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30. *Bedrock* at [110].

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36. *Parkview*.

37. *Parkview* at [248].

38. *Parkview* at [248].

39. *Parkview* at [248].

40. *Parkview* at [248].

41. *Parkview* at [255]–[260].

42. I Bailey [9.740].

43. New South Wales only: See HBC Act, n7 at section 18BA. The author is not aware of refusal to provide access like in *Mul* being tested in Australia.

44. *Di Blasio*, n7 at [42]–[47].

45. *Hacer*.

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47. *Hacer* at [44]–[45] citing *Di Blasio* at [44] and *Mul* at [25].

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50. *Hughes* at [13].

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61. *Bitannia* at [81].

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79. *Pearce & High* at [15].

80. *Woodlands Oak* at [21[, [22] and [25].

81. *Eribo* at [70] (per Deputy Judge Acton Davis QC); *Pearce & High* at [104] (per Lord Justice Evans).

82. *Pearce & High* at [20]; *William Tomkinson* at [236].

83. *Woodlands Oak* at [24]–[25] and *Mul* at [25].

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86. *Pearce & High*.

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89. *Pearce & High* at [14].

90. *Pearce & High* at [15].

91. *Pearce & High* at [16].

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95. *Pearce & High* at [18]–[19].

96. *Pearce & High* at [21] agreeing with *William Tomkinson*, at [236].

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111. *Mul* at [26].

112. *Mul* at [30].

113. *Mul* at [30].

114. *Mul* at [28].

115 *Mul* at [28].

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117. E.g. *Sandy Island Pte Ltd v Thio Keng Thay* [2020] SGCA 86.

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HUNGERFORDS INTEREST AND LIQUIDATED DAMAGES FOR DELAY

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Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd [2023] NSWSC 343 (*Oxford* No 1) and *Oxford (NSW) Pty Ltd v KR Properties Global Pty Ltd (No 3)* [2023] NSWSC 881 (*Oxford* No 3) are interesting for a number of reasons but most importantly for the finding that the owner was entitled to *Hungerfords* interest for the period of delay and was not limited to liquidated damages for the period of delay.

Hungerfords interest is 'damages'. The term comes from the High Court decision in *Hungerfords v Walker* (1989) 171 CLR 125. That case and its implications for the construction industry are discussed in detail in 'Interest as damages' [1989] #8 *ACLN* 11. The accountants were sued for negligence in preparing tax returns.

The negligence caused the client to overpay tax and provisional tax over several years. Some of the tax could not be recouped. The client sued their accountants for the amount of tax overpaid and for interest at the rate being paid by the client to a finance company for money to finance the client's business. The rate of interest was 20 per cent per annum compounded.

The accountants argued the court could not award more than simple interest at the rate prescribed by the *Supreme Court Act 1935* (SA) (10 per cent per annum).

The High Court disagreed and drew a distinction between interest that is an actual loss (now known as *Hungerfords* interest) and interest on damages. The client was entitled to an award of the amount of interest paid by the client that would not have been paid but for the negligence of the accountants.

In *Oxford* No 1, on 12 November 2014, the owners entered a contract with the builder pursuant to which the builder contracted to construct for $2,090,000 a six apartment building.

The sole director and shareholder of the builder, Mr Kazzi owned land adjacent to the land upon which the apartment building was to be constructed.

On 20 March 2018, the builder purported to exercise a right to suspend work. In the period June 2018 to August 2018 the builder resumed work and completed some more work. Thereafter the builder ceased work.

On 20 March 2019, the owners gave the builder notice that the builder was in substantial breach of the contract and that unless the builder resumed work immediately the owners would terminate the contract.

On 5 April 2019, the owners terminated the contract. At that stage much work was left uncompleted and much work was defective. The owners caused the works to be completed. Stevenson J found that the builder was not entitled to suspend work.

On or about 29 June 2020, the owners obtained an occupation certificate and registered the strata plan. It was only then that the owners were able to give effect to pre–sales of the units.

The builder brought proceedings against the owners to recover amounts claimed in various invoices for work carried out. The contract price was payable by instalments based upon substantial completion of stages of the work. The invoices were for alleged completion of various stages of the work.

The owners argued that payment for a particular stage of work could not be claimed until the previous stage had been completed. Stevenson J agreed and held that the builder was not entitled to payment of any of the invoices.

By way of cross claim (to the builder's claim for payment of invoices) the owners claimed contractual damages from the builder for the costs incurred to complete works ($398,485), rectify defects ($420,719) and interest ($500,000) on borrowings used to fund completion and rectification works. The interest claim was a *Hungerfords* interest claim.

The *Hungerfords* interest claim was for the interest that the owners had to pay as a result of the building not being completed by 4 July 2017 being the date for practical completion under the contract.

The owners took out various loans to fund the building of the apartments. The owners sold a number of apartments (in the building) off the plan but could not settle the sale of those apartments until the works were completed, an occupation certificate obtained and the strata plan was registered. This stage was not reached until July 2020.

In so far as the owners' claim against the builder was concerned, Stevenson J found there was no distinction between payments in respect of completion of the works and payment in respect of rectification of the works. The owners were entitled to the sum of the costs.

The owners also brought a claim against Mr Kazzi for damages for breach of section 37 of the *Design and Building Practitioners Act 2020* (NSW) (the DBP Act).

Mr Kazzi could not be liable under section 37 for the costs of completion of the work as distinct from the cost of rectifying defects. Therefore, in the claim against Mr Kazzi the owners had to identify the defects in respect of which they claimed Mr Kazzi owed the owners a duty of care under section 37 and, in respect of each defect, the loss that the owners incurred as a consequence of Mr Kazzi's breach of his duty of care under section 37.

The owners relied upon the opinion of a consultant to prove the costs they incurred to have work completed and the costs they incurred in rectifying defects. The consultant estimated what proportion of the owners' total costs was to finish incomplete work and what proportion was to complete rectification of defects.

Stevenson J did not accept that the consultant's estimate of the proportion of the owners' total costs that should be ascribed to rectifying defects was evidence of the actual loss the owners incurred as a consequence of Mr Kazzi's breach of duty of care. This had serious implications for the owners' claim under section 37 against Mr Kazzi.

In *Oxford* No 1 Stevenson J found that the owners established an entitlement to damages (including *Hungerfords* interest) against the builder. He found that the owners had failed to establish their claim against Mr Kazzi personally.

In *Oxford* No 3, Stevenson J said that in *Oxford* No 1 he had overlooked the fact that during the hearing Mr Kazzi accepted that he had been in breach of his duty under section 37 of the DBP Act in relation to two items of defective work, namely, 'boundary encroachments' and 'concrete strength'.

Stevenson J found that these defects caused the owners to continue to incur interest on their borrowings. This was because, on account of the encroachment, the owners were unable to register the strata plan, obtain an occupation certificate and complete the sale of apartments until July 2020. The owners' loss as a consequence of the delay was *Hungerfords* interest that could be calculated.

... the owner was entitled to *Hungerfords* interest for the period of delay and was not limited to liquidated damages for the period of delay.

He found that Mr Kazzi was liable under section 37 of the DBP Act to the owners for *Hungerfords* interest for the same period as he allowed in the owners' claim against the builder (20 March 2019 to July 2020).

Liquidated Damages

Clause 30 of the contract provided:

If the building works do not reach practical completion by the end of the contract period the owner is entitled to liquidated damages in the sum specified in Item 13 of Schedule 1 for each working day after the end of the contract period to and including the earlier of:

(a) the date of practical completion;

(b) the date this contract is ended; or

(c) the date the owner takes possession of the site or any part of the site.

The sum specified at Item 13 of Schedule 1 was '$200 per working day calculated on a daily basis'. The owners did not claim liquidated damages. The builder submitted that the effect of this clause was to confine the owners' claim for delay damages (the *Hungerfords* interest claim) to the amount of $200 per working day and ending on the earlier of the three dates specified in the clause.

The owners contended there is a:

... familiar principle of construction that clear words are needed to rebut the presumption that a contracting party does not intend to abandon any remedies for breach of the contract arising by operation of law.

Stevenson J agreed. He said at [311]:

Indeed, cl 30 provides that the owners are 'entitled' to liquidated damages, suggesting that the parties intended that such entitlement be in addition to, and not in substitution for, such other rights as the owners might have, including for Hungerfords interest.

There is a lesson here for those drafting a liquidated damages clause.

The builder contended that interest should not run from the original date for practical completion (4 July 2017) as claimed by the owners.

Stevenson J found that since it was only on 20 March 2019 that the owners demanded that the builder resume work, *Hungerfords* interest should run from that date.

To recover *Hungerfords* interest, a claimant must show that the alleged loss was foreseeable.

Stevenson J (at [317]) said:

I do not see the fact that the builder did not know of the owners' borrowings at the date of contract is, itself, a reason to deny to the owners an award of Hungerfords interest. That is because an award of interest at common law arises because 'it is a foreseeable loss, necessarily within the contemplation of the parties, which is directly related to the defendant's breach of contract or tort'. It is thus an award of damages under the first limb referred to in Hadley v Baxendale: loss arising naturally and in the usual course of things from the breach of contract in question, rather than under the second limb in Hadley v Baxendale, namely loss which might reasonably be supposed to have been in the contemplation of the parties at the time they made the contract.

If an owners corporation is faced with a large bill for rectifying defects and the owners corporation is contemplating a claim against the builder or a claim under section 37 of the DBA Act against someone else, the owners corporation should consider whether, rather than the owners corporation imposing a levy on unit owners to fund the cost of repairs, the owners corporation would be better advised to borrow the money necessary finance the cost of repairs, with a view to including in the claim, a claim for Hungerfords damages. The individual unit owners may prefer this course.

LEVELLING THE PLAYING FIELD—PROHIBITING UNFAIR CONTRACT TERMS IN AUSTRALIA

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INTRODUCTION

This is a reminder that a significant change is on the horizon for companies using standard form contracts in Australia. These matters were raised in the November 2022 edition of *Construction Matters*.[1]

New unfair contract terms ('UCT') reform is set to take effect from 9 November 2023, ushering in a pivotal shift in the contracting landscape. The reform aims to bolster consumer and small business protection by curbing UCT, ensuring a fairer playing field for all parties.

Companies should carefully review and potentially amend their standard contracts to ensure compliance with the upcoming changes and avoid the risk of hefty penalties under the Australian Consumer Law ('ACL').

BACKGROUND

In 2016, the UCT provisions within the ACL were amended to bridge the evident power imbalance between small businesses and larger counterparties when entering into standard form contracts for the supply of goods or services. However, the existing provisions have often been said to lack a significant degree of deterrence to large companies from using unfair terms in their standard form contracts.[2] Consequently, unfair terms remained in such contracts, allowing large companies to retain their advantageous negotiating positions against small businesses.

On 9 November 2023, the UCT provisions will incorporate changes proposed and approved in the *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) (*Amending Act*). Although the general nature of the provisions does not change, the *Amending Act* significantly widens the application of the UCT provisions and imposes large penalties for contravention.

WHO IS IMPACTED BY THE CHANGES?

Companies that issue pre–written template contracts to a party who is a consumer or a small business are likely to be impacted by the changes.

The UCT provisions will apply to:

- standard form contracts; and
- where a party is a consumer or a small business.

WHAT IS A STANDARD FORM CONTRACT?

A standard form contract is understood to be a contract prepared by one party that is issued to the other party in circumstances where the terms and conditions are not normally able to be negotiated or amended.

Under the current ACL provisions, the factors a court must consider in determining whether a contract is a standard form contract are:

- whether one party has all/most of the bargaining power;
- whether the contract was prepared by one party before any discussion between the parties;
- whether one party was required to accept or reject the contract in the form presented;
- whether there was an opportunity to negotiate the terms of the contract;
- whether the contract takes into account the specific characteristics of the other party or the transaction; and
- any other factors it considers relevant.

The *Amending Act* expands on the existing factors by inserting an additional consideration—whether the party who prepared the contract has made other contracts that are the same or similar, and the number of times a same or similar contract has been used.

The *Amending Act* also clarifies that a contract may be a standard form contract despite:

• the party receiving the contract having the opportunity to negotiate minor or insubstantial changes;

• the party receiving the contract having the ability to select terms from a range determined by the party that prepared the contact; and

• the party that prepared the contract negotiating with a third party over the same or similar relevant contract.

SMALL BUSINESS

One important change for companies to note is the adjustment to the threshold of what is considered a small business for the purposes of the UCT provisions.

A small business under the UCT provisions is now a business with:

• fewer than 100 employees (excluding non–regular casuals and assessed pro rata for part–time employees); or

• adjusted turnover of less than AU$10 million.

This is a significant threshold increase from the existing provisions where the employee figure for a small business is fewer than 20 employees (excluding casuals).

If either of the parties to a standard form contract is considered a small business based on the above, the contract will be considered a small business contract and the UCT provisions will apply.

The *Amending Act* also removes any contract value thresholds that previously narrowed the scope of the UCT provisions. As such, the only financial parameters defining the application of the UCT provisions are those that define a small business.

The amendments mean that a much larger number of consumers and businesses will be captured under the UCT provisions.

Along with the wider coverage is the increased bite the *Amending Act* introduces to the UCT provisions. The key change is the introduction of civil penalties for a business that:

• makes or drafts a small business standard form contract with an unfair term in it; and

• applies or relies on, or seeks to apply or rely on, an unfair term in a standard form small business contract.

The maximum civil penalty for a body corporate contravening the UCT provisions in relation to new or renewed contracts from 9 November 2023 will be the greater of:

• AU$50 million;

• three times the value of any benefit derived from the relevant breach; and

• 30 per cent of the concerned company's adjusted turnover during the relevant period.

The civil penalty for an individual contravening the updated UCT provisions is AU$2.5 million.

WHAT IS AN 'UNFAIR' TERM?

The ACL states that a contract term in a standard form contract is unfair if it:

• would cause a significant imbalance in the parties' rights and obligations under the contract;

• is not reasonably necessary to protect the legitimate interests of the advantaged party; and

• would cause detriment to a party if applied or relied on.

Taking the above into consideration, whether a term is considered unfair highly depends on the context of the contract. As such, it is difficult to categorically identify clauses in standard form contracts that will be deemed unfair.

The ACL provides some assistance by providing a list of types of clauses that may be unfair, for example:

• a term that permits, or has the effect of permitting, one party (but not another party) to terminate the contract;

• a term that penalises, or has the effect of penalising, one party (but not another party) for a breach or termination of the contract;

• a term that permits, or has the effect of permitting, one party (but not another party) to vary the terms of the contract;

• a term that permits, or has the effect of permitting, one party unilaterally to vary the characteristics of the goods or services to be supplied, or the interest in land to be sold or granted, under the contract;

• a term that limits, or has the effect of limiting, one party's vicarious liability for its agents; and

• a term that limits, or has the effect of limiting, one party's right to sue another party.

Recent case law and ACCC enforcement outcomes can also provide insights on what may or may not be considered unfair.

In the case of *Carnival PLC and Another v Karpik*,[3] the Federal Court found that a class action waiver clause in a cruise contract for the Ruby Princess was not an unfair contract term for the purposes of the ACL. The reasons were that the clause did not tilt the rights and obligations under the contract in the cruise operator's favour, and the cruise operator had a legitimate interest in avoiding the burden of class actions brought against it.

Also relevant was that the relevant clause was brought to the attention of those suffering the detriment of it.

In *ACCC v Fujifilm Business Innovation Australia Pty Ltd*,[4] the Federal Court found that a number of terms in Fujifilm's standard goods and services contracts were unfair.

The ACCC commenced proceedings seeking declaratory and injunctive relief, as well as requiring Fujifilm to communicate and correct its template contracts, and enter a compliance program.

The ACCC and Fujifilm eventually agreed consent orders after mediation that their template contracts contained unfair terms.

Some examples of these unfair terms are:

- unilateral price variation clauses;
- automatic renewal (without notification) clauses;
- customer having to pay Fujifilm all costs and expenses Fujifilm incurs in exercising its rights under the contract on a full indemnity basis, but no corresponding right for the customer and no requirement on Fujifilm to minimise costs;
- Fujifilm retaining ability to suspend the provision of services if the customer breaches the contract, but still requiring the customer to pay for the services;
- immediate termination clause if the customer breaches the contract with no corresponding right for the customer and no right for the customer to remedy their breach;
- requirement of payment from the customer to Fujifilm for the goods or services if Fujifilm terminates the contract; and
- the ability to invoice the customer regardless of whether the goods or services had been delivered.

TAKEAWAYS

It is essential for companies to be aware of the evolving legal and contracting landscape. The upcoming changes to UCT legislation have significantly expanded its reach and will impact a much broader spectrum of companies. Notably, the revised definition of small business now encompasses a larger pool of businesses, which will impact the contracting relationships of many larger project participants and is likely to apply to many construction industry subcontracts.

Further, the substantial penalties for non–compliance necessitate a review of internal standard form contract templates to avoid potentially severe financial consequences.

... the revised definition of small business now encompasses a larger pool of businesses, which will impact the contracting relationships of many larger project participants and is likely to apply to many construction industry subcontracts.

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THURIN AND *VAUGHAN CONSTRUCTIONS* SORTED—VICTORIAN PARLIAMENT PAVES WAY FOR CONTRIBUTION CLAIMS TO BE HEARD IN VCAT

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Recent decisions discussed below determined that Victorian Civil and Administrative Tribunal ('VCAT') does not have jurisdiction to hear and determine any proceeding involving exercise of judicial power in relation to a federal matter or contribution claims brought under Part IV of the *Wrongs Act 1958* (Vic) (Wrongs Act).

The passing of the *Justice Legislation Amendment Act 2023* (Vic) last week by the Victorian parliament means that Part IV contribution claims can now be determined by VCAT. In this article, we look at how amendments to the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) (VCAT Act) and the *Wrongs Act* are expected to impact clients.

INTRODUCTION

Since the decision of *Thurin & Anor v Krongold Constructions (Aust) Pty Ltd & Ors*[1] (*Thurin*), domestic building disputes in VCAT have been in a state of flux. This decision confirmed that VCAT does not have jurisdiction to hear any proceeding involving an exercise of judicial power in relation to a federal matter.

Where a proceeding involved claims (or defences) under federal legislation such as the *Insurance Contracts Act 1984* (Cth) and the Australian Consumer Law (the *Competition and Consumer Act 2010* (Cth)) parties were applying to VCAT to have the matter referred to a judicial member so the proceeding could be struck out and referred to a court.

Debate ensued between parties about whether a federal matter had been or would be invoked. Confusingly, misleading and deceptive conduct claims made under the Australian Consumer Law ('ACL') did not necessarily invoke a federal matter[2] but defences pleaded to such claims did.[3]

Many proceedings the subject of transfer application were transferred to the County Court of Victoria. Some applications for transfer are still pending.

To confuse matters further, in *Vaughan Constructions Pty Ltd v Melbourne Water Corporation*[4] (*Vaughan Constructions*) his Honour Justice Delany in his role as an Acting Member of VCAT, held that VCAT does not have jurisdiction to determine claims for contribution brought pursuant to Part IV of the *Wrongs Act*.

This decision was delivered in circumstances where VCAT had been determining claims brought under Part IV of the *Wrongs Act* for years.

The decision relied upon the absence of a definition of 'court' in Part IV. *Vaughan Constructions* further upended cases in the Building and Properly List in VCAT with parties uncertain about whether they would be time barred from commencing or pursuing (upon the transfer of a proceeding) a third party proceeding in the County Court, if the 10 year limitation period under section 134 of the *Building Act 1993* (Vic) had expired.

Those practising in the area of domestic building disputes will be breathing a sigh of relief this week with the passing by the Victorian parliament of the *Justice Legislation Amendment Act 2023* (Vic) (JLA Act).

Of key importance for domestic building disputes are the following amendments:

- the definition of 'court' in the *Wrongs Act* has been expanded to include VCAT, allowing VCAT to hear contribution claims made under Part IV of that Act thus addressing the decision in *Vaughan Constructions*; and
- the VCAT Act has been amended such that where a

proceeding has been transferred to a court by the tribunal under section 77(3) of the VCAT Act, the court now has the power to extend any limitation period that applies in relation to the matter in certain circumstances.

CONTRIBUTION CLAIMS

The JLA Act amends the *Wrongs Act* in three ways:

First, section 23A(3) is amended to include the following definitions;

- court includes VCAT;
- judgment, in relation to VCAT, includes decision, order and declaration; and
- the existing definition of writ now includes an 'application to VCAT'.

Second, the JLA Act amends sections 24(2) and (2B) to substitute 'proceeding' for 'trial'.

Third, the JLA Act includes transitional provisions to validate decisions, orders or declarations made by VCAT under Part IV before the commencement of the JLA Act, operating as if the amendment were in place at the time of the decision, order or declaration was made. Importantly, these curative provisions do not apply where:

- the relevant order was quashed, overturned or reversed by the County Court, or the Supreme Court (including the Court of Appeal) before the commencement date on the ground that VCAT had no jurisdiction to make a decision, order or declaration in respect of contribution under Part IV; and
- the relevant order is the subject of an appeal or a review which includes the ground that VCT had no jurisdiction to make a decision, order or declaration in respect of contribution under Part IV that been commenced but not determined before the commencement date (10 October 2023).

Parties will now be able to make claims for contribution under Part IV of the *Wrongs Act* in VCAT. It is anticipated that those matters which were awaiting referred by a judicial member under section 77 because a contribution claim was pleaded in the matter, will remain in VCAT.

TRANSFERS UNDER THE VCAT ACT TO A COURT

By insertion of the new section 77(4), the JLA Act provides courts with the power to extend the limitation period that applied to the commencement of a proceeding, to allow the proceeding (involving a federal matter) to be commenced and determined.

This will apply to cases which have been transferred from VCAT to a court pursuant to section 77(3) of the VCAT Act.

For the limitation period to be extended, the court must be satisfied that:[5]

- the proceeding involves the same subject matter as a proceeding in the tribunal that was struck out on grounds that included that the tribunal lacked jurisdiction to resolve controversies involving federal subject matter;
- the late commencement of the proceeding is attributable to additional steps the persons were required to take to have it determined by the court because the tribunal proceeding was struck out; and
- it is fair and reasonable to extend the limitation period.

In addition, the JLA Act expands the class of VCAT members who can exercise powers under sections 77(1) and 77(3) from a judicial member (only) to now include presidential members and a senior member who has been an Australian lawyer for not less than five years.

Those practising in the area of domestic building disputes will be breathing a sigh of relief ... with the passing by the Victorian parliament of the *Justice Legislation Amendment Act 2023* (Vic)

The amendments are expected to bring greater efficiency to the Building and Property List in VCAT. This List has been plagued by delays and uncertainty since COVID–19 and the court decisions in *Thurin* and *Vaughan Constructions*.

The requirement for judicial members to hear and determine applications under section 77 has created delays in proceedings. This amendment is expected to make it quicker and easier for VCAT to transfer proceedings to a court where application is made under section 77.

AMENDMENTS TO THE *DOMESTIC BUILDINGS CONTRACTS ACT 1995* (VIC)

Where a proceeding is commenced in the Supreme Court, the County Court or the Magistrates' Court which involves a domestic building dispute, section 57 of the *Domestic Building Contracts Act 1995* (Vic) (DBCA) required the court to stay such an action (subject to requirements in section 57(2)(a) and (b) being met).

The JLA Act has amended the DBCA to qualify VCAT's priority jurisdiction over domestic building disputes, where the court has reasonable grounds to consider that the action raises or may raise in the future, a federal matter (federal legislation).

In practical terms this will mean there is little utility in applying for a stay in a domestic building dispute proceeding which has been brought in a court, if the proceeding involves or is likely to involve a claim or defence invoking federal legislation.

WHAT CAN CLIENTS EXPECT?

The amendments are expected to bring greater efficiency to the Building and Property List in VCAT. This List has been plagued by delays and uncertainty since COVID–19 and the court decisions in *Thurin* and *Vaughan Constructions*.

It is anticipated that amendments to the VCAT Act and the *Wrongs Act* in particular, will enable VCAT to case manage proceedings in the list with more certainty and efficiency. This is very good news for our clients who underwrite risks in the domestic building space or who are contractors or other construction professionals involved in domestic building disputes.

The changes came into effect on 11 October 2023.

REFERENCES

1. *Thurin & Anor v Krongold Constructions (Aust) Pty Ltd & Ors* [2022] VSCA 226.

2. The ACL was adopted as Victorian law pursuant to section 12 of the Victorian Act: Australian Consumer Law and *Fair Trading Act 2012* (Vic).

3. Contributory negligence defences pleaded under section 137B and apportionment defences pleading under Part 6A of the *Competition and Consumer Act 2010* (Cth) invoked federal legislation.

4. *Vaughan Constructions Pty Ltd v Melbourne Water Corporation (Building and Property)* [2023] VCAT 233.

5. For the full requirements see the new section 77(4) of the VCAT Act.

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CHANGING LEGISLATION—THE 2014 BANKSTOWN FIRE

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INTRODUCTION

It does not take a large event to spark a frenzy of legislative reform. From the broad topics of employment and immigration to aged care and anti–discrimination laws, the umbrella of law reform has covered almost every aspect of legislation present in Australia.

However, a single unit fire in 2014 established amendments in over five New South Wales statutes and authoritative bodies. The 2014 Bankstown fire has resulted in amendments in the Environment Planning and Assessment Regulation 2000 (NSW) (EP&A Regulation) and new duties allocated to bodies such as the Department of Planning, the Australian Building Codes Board and Ministers for Health, Planning, Emergency Services and NSW Fair Trading.

Although, on the balance of probabilities, the cause of the fire on the balcony was unidentified, there was nonetheless a fire that occurred in Unit 53, Tower B, 4 West Terrace, Bankstown. This fire resulted in the death and serious injury of Connie Zhang and Ginger Jiang respectively. Through the course of the coronial process, a coronial inquest was launched to investigate the cause and circumstances of the fire and the death of Connie Zhang.

Many arguments were brought up throughout the course of the coroner's findings. It was largely arguments over the building's effective height that resulted in the worrying disregard for the requirement of essential fire life safety systems throughout the building.

The Bankstown unit fire serves as a reminder of how quickly legislative reform can occur and how important it is to stay up to date with relevant laws in the construction industry.

CORONIAL INQUEST INTO BANKSTOWN FIRE

On 6 September 2012, a fire broke out on the balcony of a residential apartment building located at 4 West Terrace, Bankstown, NSW. After the fire engulfed the apartment in black smoke and temperatures of over 600°C, it forced two of its occupants, Connie Zhang and Ginger Jiang, to jump over five storeys from a window ledge of the bedroom they were stuck in. The fire resulted in the death of Zhang and serious injury of Jiang.

A coronial inquest and inquiry was launched by New South Wales Deputy State Coroner Dillon into the death of Zhang and the fire. This inquiry resulted in the investigation of whether the apartment building complied with the applicable fire safety standards and whether these standards were adequately regulated and enforced.

The inquest and inquiry resulted in the hearing in the Coroners Court that suggested multiple recommendations in relation to fire safety.

RECOMMENDATIONS

As a result of the inquest, Mr Dillon made many recommendations for legislative reform. From changes to clauses in the EP&A Regulation to creating a statutory regime for fire safety accreditation and auditing, a total of 14 recommendations were made.

Conversely, between 2015 and 2023, only five of the recommendations have been seemingly implemented into statutes.

It was recommended that research be conducted into the off–setting of costs associated with installing fit–for–purpose sprinkler systems in new Class 2 and Class 3 buildings through the reform of other fire safety requirements.

This recommendation resulted in the 2018 Cost Impact Assessment Report for Fire Sprinklers in Class 2 and Class 3 buildings by the Australian Building Codes Board.[1] The result of this report was that installing fire sprinkler systems that comply with the deemed–to–satisfy provisions of the National Construction Code ('NCC') have a minimal cost impact.

As a result of this report and further research, the NCC required fire sprinkler systems in Class 2 and Class 3 buildings as per its 2022 publication.

Mr Dillon encouraged the expedition of changes proposed to clauses 144 and 152 of the EP&A Regulation that affected the role of Fire and Rescue NSW ('FRNSW') in the assessment of alternative solutions. The proposed changes would mean that FRNSW are better able to apply their resources on a risk basis when addressing building fire safety.

This encouragement boosted support for the proposed changes and resulted in allowing Fire Safety Reports to be discretionary as of October 2015.[2] The changes that were incorporated into the EP&A Regulation were then repealed in 2022 and formed sections 18 and 26–29 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW).[3]

Amendments to the NCC were also recommended, prompting the Australian Building Code Board to amend the NCC to require the installation of fit–for–purpose sprinkler systems in all new Class 2 and Class 3 buildings in conjunction with the possible reform of other fire safety requirements.

However, it was not until the release of the 2022 NCC that required sprinklers throughout the whole building if it is classed as a Class 2 or Class 3 building and has an effective height of not more than 25 metres and a rise in storeys of four or more.

Further legislative reform was recommended to allow lawful powers of entry for appropriately authorised inspectors from the Department of Planning, Office of Fair Trading, Council or FRNSW to inspect property in circumstances where a reasonable suspicion of unlawful occupancy is held.

In March 2018, the *Environmental Planning and Assessment Act 1979* (NSW) amended section 9.5 to allow department secretaries to accept enforceable undertakings on behalf of New South Wales Councils and the Department of Planning.[4]

Finally, a statute regime was also recommended to be implemented. This regime would enforce and monitor the accreditation and auditing of persons or entities that undertake annual fire safety checks and issue annual fire safety statements.

It was recommended that consideration to the Australian Standard 1851 'Routine Service of Fire Protection Systems and Equipment' be an option for meeting maintenance requirements for essential fire safety systems. The New South Wales government has since introduced reforms to fire safety to improve the quality of checks made throughout the design, approval, construction and maintenance phases of a building.

Five years after the inquiry, the Australian government approved the Fire Protection Association Australia ('FPAA') accreditation scheme. From 2020, only practitioners accredited by the FPAA can perform the function of an accredited fire safety practitioner.

SEEMINGLY NEVER–ENDING REFORM

FUTURE FAILURES OF FIRE SAFETY SYSTEMS IN RESIDENTIAL APARTMENT BUILDINGS

On a more monumental scale, the Bankstown fire can be likened to the Grenfell Tower fire that occurred in London in the early hours of 14 June 2017. Akin to the Bankstown fire, the Grenfell Tower was exasperated by a lack of enforced fire safety measures. Although five years and 17,000 kilometres apart, the two fires jointly highlight the need for enforced legislative fire safety requirements.

The lack of fire safety measures in the Grenfell Tower at the time of the fire profoundly affected the measures of the fire brigade fighting against the flames that burned for over 24 hours.

According to findings reported by Dr Barbara Lane on behalf of the Grenfell Tower Inquiry, the Grenfell Tower's smoke extraction system was not working at the time of the fire, there was no wet riser present at the building to allow fire fighters to combat flames at the top of the building and it was found that fire doors to residential apartments did not meet the fire resistance standards required at the time.[5]

In order to prevent future failures of fire safety systems in residential apartment buildings, legislative reform and current laws about fire safety should be well–researched by construction professionals and adhered to in order to prevent further legislative reform and ultimately creating more building defects as a result.

Although legislative reform is encouraged in order to have laws that represent current social issues and values, in regard to construction compliance; compliance will be more difficult

to maintain if reform is occurring frequently. These consequences make it evermore present to aim to not only build compliant buildings, but safe buildings.

FURTHER LEGISLATIVE REFORM AS A RESULT OF FIRE SAFETY SYSTEMS IN RESIDENTIAL APARTMENT BUILDINGS

A fire took place in the early hours of 25 November 2014 at the Lacrosse building, Melbourne. Fortunately, there were no fatalities or serious injuries, but approximately 225 residential units were affected by fire. The fire raised a number of questions relating to the compliance of the building with the NCC and the external wall cladding system used and whether it had been approved and accredited.

The fire prompted many states across Australia to look at their current construction legislation and propose reforms. In 2019, the New South Wales government proposed a complete overhaul of compliance reporting and requirements. They implemented the requirement for builders, designers, engineers and other construction professionals who provide designs and specifications of buildings, to declare that their plans comply with the BCA and other relevant building regulations and submit those declarations to the Building Commissioner.[6]

Whether a fire occurs in a single unit or on the façade of a multi–story residential apartment building, legislative reform is likely to follow.

CONCLUSION

It is a miracle that the fatality count of the Bankstown fire was only one, but the occurrence of the fire is evidence that loss of life can spark a spate of legislative reform that can potentially last years.

Legislative reform underpins the ability to uphold ever–changing societal issues and values and serves as a necessary foundation of democracy. However, reform is rendered almost useless if it is not abided by. Whilst laws are implemented and amended to prevent events like the Bankstown and Grenfell fires, they are inadequate if builders, developers and insurers ignore and do not uphold or implement these changes.

It is more likely than not that Australia will face further drastic residential apartment fires as a result of unenforced fire safety measures. Following these fires, it is likely that further legislative fire safety reform will occur. It is for this reason that it is ever more important for lawyers, builders, insurers and construction professionals to be aware of what today's current requirements are and to ensure they are enforced.

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3. Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) sections 18, 26–29.

4. *Environmental Planning and Assessment Act 1979* (NSW) Part 6 Div 9.1 section 9.5.

5. Dr Barbara Lane, Grenfell Tower—Fire Safety Investigation: The Fire Protection Measures in Place on the Night of the Fire, and Conclusions as to: The Extent to Which They Failed to Control the Spread of Fire and Smoke; The Extent to Which They Contributed to the Speed at Which the Fire Spread (Phase 1 Report—Section 2, 5 November 2018) 2.14.13, 2.23.25, 2.29.1.

6. Scott Higgins, Luke Stirton and Callum Jubb, 'Biggest Overhaul of Building Laws in NSW History—What you Should Expect', Mills Oakley (Blog Post, March 2019) <https://www.millsoakley.com.au/thinking/biggest-overhaul-of-building-laws-in-nsw-history-teaser-released-what-you-should-expect/>.

WHEN CLAIMING STATUTORY DEBTS UNDER THE *SECURITY OF PAYMENT ACT* MAY NOT BE A SLAM DUNK

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INTRODUCTION

It is well established policy now enshrined under the *Building and Construction Industry Security of Payment Act 1999* (NSW) (SOPA) that for the construction industry to remain sustainable, subcontractors and suppliers must have regular and reliable access to cashflow. Aside from limited circumstances,[1] the risk of insolvency (of either party) rests with the payor (recipient of the payment claim) subject to the final determination of the parties' rights.

The SOPA (as well as legislation in other states and territories) enables a subcontractor[2] who remains unpaid after submitting a payment claim, to which a lesser amount has been scheduled or no schedule provided, to elect to proceed to an adjudication or have the matter determined as a debt in a court of competent jurisdiction.

If the subcontractor wishes to proceed to an adjudication, the contractor must have notice of the election and be given the opportunity to provide a payment schedule.

In effect, the contractor will have a 'second bite of the cherry'. This may be a preferred course if the parties have an amicable relationship and a payment, for whatever reason, had been inadvertently missed. If the contactor then pays the amount claimed, there will be no further action required (aside from potential claims for interest).

If the contractor fails to provide a payment schedule a second time, the subcontractor may proceed to an adjudication and the contractor will be unable to submit or rely on any adjudication response.

Subcontractors might prefer to proceed to adjudication, relying on what has become known colloquially as the 'pay now argue later' system of justice, as opposed to a court hearing where a judge has broader jurisdiction to determine what can be included in a defence (as discussed in *Marques* below). The SOPA timelines are also strictly enforced which may be preferable compared with the uncertainty of time in bringing a proceeding to a final hearing.

Taking the court option for enforcement of the debt has the advantage of depriving the contractor from a second chance at delivering a payment schedule. However, proceeding to court has two important caveats for subcontractors to bear in mind:

(1) the court must be satisfied that there is a valid payment claim and that it was served on the contractor; and

(2) the contractor may raise a defence provided that the defence does not relate to 'matters arising under the construction contract'.

In relation to (1) above, the subcontractor should ensure that:

(a) the payment claim has been issued to the correct contracting entity;[3]

(b) there is a construction contract (which does not have to a be written contract, provided that the 'arrangement' gives rise to a legally binding obligation);[4] and

(c) the payment claim has met the requirements of SOPA, by sufficiently describing the work to which the claim relates, and by ensuring valid service of the payment claim within the strict time requirements under SOPA.

If there is doubt about any of the above, the subcontractor will need to consider whether to submit another payment claim the following month (ensuring it is compliant with SOPA) or run the risk of a court finding that the payment claim was invalid.

There is a further issue of disentitling conduct, including whether a payment claim was paid on the basis of misleading conduct (under the Australian Consumer Law ('ACL')) in circumstances where the claimant incorrectly stated that all subcontractors had been paid their entitlements.

This issue was considered in a recent case in the New South Wales Supreme Court, *Marques Group Pty Ltd v Parkview Constructions Pty Ltd* [2023] NSWSC 625 (*Marques*).

DECISION IN *MARQUES*

Justice Rees in *Marques* declined to order summary dismissal of a defence in a SOPA debt claim that included a defence of misleading or deceptive conduct under section18 of the ACL.

The contractor in that case had alleged that a supporting statement accompanying the subcontractor's payment claim was misleading or deceptive under section 18 of the ACL. The defence alleged that the subcontractor's statutory declarations—that it had paid its workers all due payments, was not true because the subcontractor had not paid

its workers' superannuation contributions and Australian construction industry redundancy trust contributions. The contractor relied on these statements when preparing and issuing the payment schedules and had the contractor been aware of the underpayments, they would have scheduled an amount of $0, or an amount less than that scheduled.

The contractor relied on the principles established in *Bitannia Pty Ltd v Parkline Constructions Pty Ltd* (2006) 67 NSWLR 9: a defence under the ACL is not barred by sections 15(4) and 16(4) of SOPA. Further, where a plaintiff sues on a cause of action, one essential element of which has been created by the plaintiff's misleading conduct, the contravention affords a defence and judgment cannot be obtained: *Bitannia* at [8], [13], [17], [124].

As a result of the subcontractor's contravention of section 18 of the ACL, the contractor scheduled positive amounts when, had the contraventions not occurred, it would have scheduled nothing. It was argued that the defence under the ACL trumped the contractor's rights under SOPA, where Commonwealth legislation prevailed in the event of inconsistency and entitled the contractor to dismissal of the subcontractor's claim.

The subcontractor's arguments for summary judgment were based on the underlying policy of SOPA—to shift insolvency risk to the payor while rights under a construction contract are finally determined. It was submitted that to allow recipients of payment claims to raise points of this kind (insolvency of the claimant) would have a 'chilling effect' as such allegations are easily made and it would be a simple matter for the recipient to thereby delay payment, contrary to the purpose of SOPA.

While Rees J agreed that the contractor's defence based on alleged misleading and deceptive conduct in respect of the subcontractor's solvency 'appears to run contrary to the SOPA scheme', her Honour ultimately applied well established principles of summary judgment thresholds, holding that:

... [a]s inherently unattractive as that defence is [the ACL defence], I cannot say that it is so clearly untenable that it cannot possibly succeed.

The motion for summary dismissal was dismissed, with costs and the proceedings listed for further directions.

IMPLICATIONS

Subcontractor's rights to regular cashflow are fundamental to the sustainability of the construction industry. The SOPA provides this framework, however, when subcontractors pursue late (or no) payments in court, they should ensure that:

- there is a valid construction contract and complying payment claim has been correctly served on the correct contracting person or entity; and
- there has been no other disentitling conduct in relation to matters existing outside of the construction contract, for example by providing incorrect statements in subcontractor payment declarations or by engaging in unconscionable conduct—which can be raised as a defence in a court proceeding and have the counter–intuitive effect of delaying payment while the parties incur further costs in a court battle.

If there is doubt over any one or more of these steps after the payment claim has been issued, the subcontractor should address them in the next payment claim in the subsequent month.

REFERENCES

1. More limited rights have been recently introduced to SOPA to preclude a party in liquidation from submitting a payment claim (on the basis that payment to a liquidator would be unrecoverable under the construction contract, thus making the interim nature of the relief final, which is contrary to the policy of the legislation).

2. The term 'subcontractor' has been used for convenience. Any party (including for example a head contractor, design consultant or supplier) who undertakes construction work under a construction contract is able to utilise SOPA.

3. *Grave v Blazevic Holdings* [2010] NSWCA 324.

4. *Lendlease Engineering Pty Ltd v Timecon Pty Ltd* [2019] NSWSC 685.

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SCOPE OF COVERAGE FOR CONSTRUCTION CLAIMS UNDER PROFESSIONAL INDEMNITY POLICIES

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INTRODUCTION

The scope of coverage under a professional indemnity policy for construction companies undertaking design and construction services is often a vexed issue. Pure construction activities are often not covered.

However, the Federal Court of Australia's decision in *FKP Commercial Developments Pty Ltd v Zurich Australian Insurance Ltd (No 2)* [2023] FCA 582 has clarified the scope of cover for construction activities where policies have a particular type of extension clause.

The decision has important implications for construction companies and insurers. It serves as a reminder to be aware of the precise wording of an insurance policy, including how particular clauses may be interpreted in the context of the policy as a whole.

BACKGROUND

The applicants, FKP Commercial Developments and FKP Constructions Pty Ltd ('FKP'), were insured by the respondent under a Design and Construction Professional Indemnity policy in relation to the development of two apartment buildings.

The owners corporation brought a claim for damages against the applicants in relation to defects in the building works. The applicants sought indemnity from the insurer. Their claim was denied.

The Federal Court considered the construction and operation of clause 3 of the extension of cover in the policy, which provided:

Consultants, Subcontractors and Agents

We agree to indemnify the insured for loss resulting from any claim arising from the conduct of any consultants, subcontractors or agents of the insured for which the insured is legally liable in the provision of the professional

The decision has important implications for construction companies and insurers. It serves as a reminder to be aware of the precise wording of an insurance policy, including how particular clauses may be interpreted in the context of the policy as a whole.

services. No indemnity is available to the consultants, subcontractors or agents.

The Federal Court considered whether the claim made against FKP was a:

… claim arising from the conduct of any consultants, subcontractors, or agents of the insured for which the insured is legally liable in the provision of the professional services.

Key to the issue was whether the coverage extended to FKP in circumstances where:

• FKP had subcontracted the design and construction works it was obliged to perform under the head contract and had itself performed only project management and construction management services; and

• there was no causal connection between the provision of the professional services and the alleged defects.

The court considered this by reference to three components:

(1) whether the claim arises from the conduct of FKP's subcontractors;

(2) whether FKP is legally liable for the conduct of its subcontractors; and

(3) whether FKP is legally liable in the provision of the professional services.

THE DECISION

The court concluded that clause 3 provided coverage to FKP as:

(1) it was clear that the claim made against FKP arose from the conduct of its subcontractors in performing the residential building work;

(2) FKP was liable for a breach of statutory warranties, whether they undertook the work themselves or engaged subcontractors to perform the work; and

(3) the claim did not need to result from the insured's professional services and the facts giving rise to the claim need not include the insured's provision of professional services. Rather, it was enough that the claim arose from conduct by the insured's subcontractors where a substantive element of the factual matrix in which the liability arose was the provision by the insured of professional services.

In reaching this view the court was influenced by the wording of the extension clause which did not explicitly require a causal connection between the insured's legal liability for its subcontractors and the insured's provision of professional services.

It was noted that, if the parties had intended such a causal connection, there were many connective phrases which were available and which could have been used in the clause. It was also noted that this construction was consistent with the absence from the definition of 'subcontractors' of any reference to 'professional services'.

KEY TAKEAWAYS

Construction companies should carefully review their professional indemnity policies, or seek advice, and determine whether the policy contains a similar extension of cover for work undertaken by subcontractors. If so, claims for construction activities undertaken by subcontractors may be covered depending on the wording of the extension clause, the circumstances of the claim and the wording of the policy as a whole.

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NSW GOVERNMENT PROPOSES REFORMS TO TRANSFORM THE BUILDING SECTOR

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INTRODUCTION

The Building Legislation Amendment Bill 2023 (NSW) is the next step in the New South Wales government's commitment to transformational building reforms in New South Wales.

The Bill amends various Acts with a view to improving customer protection for homeowners, increasing accountability for unsafe building products and ensuring the regulator is well equipped to tackle poor behaviour in the industry and serious defects in homes.

The Bill follows the release of a tranche of Bills for public consultation to promote the construction of 'trustworthy buildings', restore consumer confidence in the construction industry and empower the New South Wales Building Commissioner.

We highlight some of the key amendments of the Bill below.

AMENDMENTS TO THE *HOME BUILDING ACT 1989* (NSW) TO EXPAND THE POWERS OF THE BUILDING REGULATOR

INVESTIGATION AND ORDERS

The Bill will expand the powers of the Secretary of the Department of Customer Service under the *Home Building Act 1989* (NSW) ('HBA') to Class 1 Buildings (being standalone single dwellings of a domestic or residential nature) to:

- authorise inspectors to investigate residential building work;
- issue rectification orders requiring contractors to rectify damage or defects in residential building work, including where the defective work has caused damage to other parts of the building or other structures, including neighbouring properties; and
- issue stop work orders requiring developers to stop building work where that building work could result in significant harm or loss to the public, occupiers or potential occupiers, there is a change in principal certifier or building practitioner, or the building work could prevent the issue of an occupation certificate or building compliance declaration.

For the purposes of these expanded powers, 'residential building work' will be taken to include:

- 'specialist work', which includes plumbing and drainage, mechanical services, gas and electrical wiring work;
- work under the HBA which impacts other land and buildings; and
- work that relates to, or leads to, other residential building work (including the work referred to in paragraphs (a) and (b)).

These powers are intended to operate 'proactively', providing for issues to be identified early so that defective work can be rectified before the building is occupied. Currently, the HBA operates 'reactively', with rectification orders requiring a customer to first raise a dispute or complaint.

CRACKING DOWN ON PHOENIXING ACTIVITY

The Bill will expand the powers of the Secretary to:

- cancel or prevent the issue of contractor licenses; and
- disqualify individuals and body corporates from holding an authority (other than an owner–builder permit),

where an individual has been the director of, or involved in the management of, a company which is under administration or convicted of a crime under the *Corporations Act 2001* (Cth), either at the time of the event or within the period six months prior.

These powers are intended to prevent practitioners who engage in intentional phoenixing activity and poor corporate behaviour from operating in the building industry, as well as increasing scrutiny on directors who surrender their title to avoid liability.

To this end, the Bill will also increase the period which a person must not have been a director or concerned with the management of an insolvent company to be eligible to hold authorities under the HBA from three to 10 years.

AMENDMENTS TO THE *STRATA SCHEMES MANAGEMENT ACT 2015* (NSW) TO PROMOTE THE USE OF DECENNIAL LIABILITY INSURANCE

The Bill will amend the *Strata Schemes Management Act 2015* (NSW) ('SSMA') to exempt developers who have effected decennial liability insurance ('DLI') from the existing strata scheme bond and inspections scheme requirements.

DLI is a new insurance product, designed to provide long–term cover against defects for owners of residential apartments. Liability under a DLI policy is determined on a strict liability basis, meaning owners are not required to prove any negligence or fault to trigger a DLI claim.

However, there is currently only one provider of DLI in the Australian market. While the New South Wales government has been actively encouraging other providers, the DLI market has not yet reached maturity. The New South Wales government is planning to eventually mandate DLI insurance for residential building works, but that cannot be achieved until the market is sufficiently mature.

The existing strata bond scheme requires developers to lodge a bond of two per cent of the total contract price for building work. If no defects are identified in the building, the bond will be returned two years after the date of the issue of the occupation certificate. The bond is proposed to increase to three per cent of the total contract price from 1 February 2024 under the Strata Schemes Management Regulation 2016 (NSW).

The Bill also allows for regulations to be made (at an appropriate time in the future) which would:

- enable DLI to be taken out as an alternative to home building compensation insurance, as required under sections 92 and 96 of the HBA—the exemption would apply to low rise apartment buildings and the developer would be required to notify the Secretary if the developer intends to obtain DLI insurance as an alternative to home building compensation insurance; and
- prohibit the issue of a complying development certificate under the *Environmental Planning and Assessment Act 1979* (NSW) or a 'strata certificate' under the *Strata Schemes Development Act 2015* (NSW) if evidence of a DLI policy has not been provided to the Secretary.

The Bill also requires developers of strata schemes to provide the Secretary with a copy of a certificate of currency for DLI prior to an application for an occupation certificate, where a bond has not been provided. A failure to do so will enable the Secretary to issue an order prohibiting the issue of an occupation certificate under the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW).

The amendments proposed by the Bill continue to promote DLI through establishing a robust regulatory framework to encourage insurers to enter the market.

The Building Legislation Amendment Bill 2023 (NSW) is the next step in the New South Wales government's commitment to transformational building reforms in New South Wales.

The Bill amends various Acts with a view to improving customer protection for homeowners, increasing accountability for unsafe building products and ensuring the regulator is well equipped to tackle poor behaviour in the industry and serious defects in homes.

However, the Bill acknowledges the importance of monitoring market maturity in the DLI space, which will be key to any future considerations about mandating DLI. To this end, the Secretary is empowered to direct insurers to provide information about their DLI policies.

AMENDMENTS TO THE *BUILDING DEVELOPMENT CERTIFIERS ACT 2018* (NSW) AND *DESIGN AND BUILDING PRACTITIONERS ACT 2020* (NSW)

The Bill will empower the Secretary to suspend the registration of registered certifiers under the *Building Development Certifiers Act 2018* (NSW) and registered practitioners under the *Design and Building Practitioners Act 2020* (NSW) if:

- the holder of a registration has received a show cause notice and the Secretary is satisfied that the grounds for disciplinary action would, if established, justify the suspension or cancellation of a registration; or
- in the Secretary's opinion there are reasonable grounds to believe that:
    - the registration holder has engaged in conduct which amounts to grounds for suspension;
    - the registration holder will continue to engage in such conduct; or
    - urgent action is needed to prevent a person suffering significant harm, loss or damage as a result of the registration holder's conduct.

A registration holder may appeal to the New South Wales Civil and Administrative Tribunal for an administrative review of the cancellation or suspension of a registration.

AMENDMENTS TO THE *BUILDING PRODUCTS (SAFETY) ACT 2017* (NSW) TO ENHANCE BUILDING PRODUCT SAFETY

ESTABLISHING A 'CHAIN OF RESPONSIBILITY' FOR BUILDING PRODUCTS

The Bill proposes to improve accountability in the building products supply chain by amending the *Building Products (Safety) Act 2017* (NSW) ('BPSA') to create a 'chain of responsibility' for building products and clarify the duties owed by each person in the chain.

The building products supply chain is proposed to include any person who:

- designs or deals with a product and knows that a product will be used in a building;
- prepares a building design that incorporates or recommends the use of a building product in a building (e.g. building designers, engineers and architects);
- uses a product in a building (e.g. a person who installs or coordinates or supervises the installation of the product in the building during construction); or
- is specified in the regulations.

The Bill seeks to impose the following duties on those in the building products supply chain:

- ensuring that building products are conforming and compliant for the intended use;
- providing required information, which includes information as to the suitability of the product or element of a product for its intended use, whether the product is only suitable for use in certain conditions, instructions for ensuring the intended use is not a non–compliant use and maintenance information;

• giving written notice to the Secretary within seven days of 'reasonably suspecting' that a non–compliance risk exists in a building product or a safety risk exists in relation to the intended use of the building product;

• where a person in the chain is responsible for:

  • a building product subject to a building product recall, that person must cease using or supplying the product, comply with the recall and provide repairs, modifications, replacements or refunds in respect of the building product (whichever is appropriate in the circumstances) if they are a supplier, manufacturer or importer of the product.

  • a building design incorporating a recalled building product, that person must inform each recipient of the design of the product recall and either amend the design to remove the recalled product, or provide an alternative product.

These duties must be discharged 'as far as is reasonably practicable' and 'taking into account risk management factors in relation to the matter to which that duty relates'. Penalties will apply if a person in the building supply chain fails to comply with a duty.

INCREASED ENFORCEMENT MEASURES

The Bill will empower the Secretary to take a number of enforcement measures in respect of building products that pose a non–compliance or safety risk and individuals who engage in unlawful conduct. These include:

• issuing building product safety notices which may be a warning, supply ban, use ban or recall in respect of a building product;

• issuing building product directions which may include a direction to a person to stop using or supplying a building product either generally or in specific circumstances, or making a building product incapable of being used or operated;

• the ability for authorised officers to seize building products if they are of the reasonable belief that a non–compliance risk exists, a safety risk exists for the intended use of the product or an offence against the BPSA has been committed in relation to the product;

• issuing show cause notices to individuals to justify why they should not be banned from carrying out a business of supplying building products if the Secretary is satisfied that person has, in trade or commerce, engaged in unlawful conduct relating to the use or supply of a building product on more than one occasion in New South Wales or somewhere else; and

• applying to the Supreme Court for trading prohibition orders where the Secretary still believes (following a submission in response to a show cause notice) that person will continue to engage in unlawful conduct.

IMPACTS OF THE BILL ON THE NSW BUILDING SECTOR

If the Bill passes, there will be many impacts for practitioners across the construction industry.

• Developers may be entitled to exemptions from the building bond regime under the SSMA and insurance requirements under the HBA if the developer effects an DLI policy for the construction of residential apartment building.

• Developers and builders of Class 1 buildings should note the Secretary's powers to investigate the construction of residential building work, issue rectification orders and stop work orders and the penalties for failing to comply with such orders.

• Registered certifiers and practitioners should note the powers of the Secretary to cancel registrations for unlawful conduct.

• Manufacturers, architects, engineers, building designers, contractors and subcontractors should consider whether they fall into the 'chain of responsibility' by virtue of using, designing or installing a building product and familiarise themselves with the duties owed by those in the chain of responsibility.

• Company directors and company managers should note the powers of the Secretary to cancel contractor licenses and disqualify individuals from holding registrations under the HBA for phoenixing activity and a history of insolvencies.

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THE KING V JACOBS GROUP—HIGH COURT OPENS THE DOOR FOR LARGER FOREIGN BRIBERY PENALTIES

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WHAT YOU NEED TO KNOW

• Section 70.2(5) of the *Criminal Code Act 1995* (Cth) (Criminal Code) prescribes a maximum monetary penalty for the offence of a corporation bribing, or conspiring to bribe, a foreign public official. That penalty is not more than the greater of: 100,000 penalty units; three times 'the value of the benefit' (if a court can determine that value); or, if the court cannot determine the value, 10 per cent of the corporation's annual turnover in a 12 month period ending the month in which the offending conduct occurred.

• In its recent judgment in *The King v Jacobs Group (Australia) Pty Ltd* [2023] HCA 23, the High Court considered the meaning of 'value of the benefit' under section 70.2(5) for the purpose of determining how the appropriate maximum penalty for a foreign bribery offence should be calculated.

• The High Court held that 'value of the benefit' should be understood as the total money received for performance of the contract (the 'gross benefit'), overturning the New South Wales Court of Criminal Appeal's interpretation of this phrase as meaning the 'net' benefit (the total money received less the legitimate costs of performance).

• The High Court's decision represents a 'win' for prosecutorial authorities, with the financial consequences of foreign bribery offending now being potentially more severe.

• This decision has potential implications for calculating maximum penalties for other corporate offences. Formulations similar to the 'three pronged' approach to calculating a penalty under section 70.2(5) of the Criminal Code are also used in a number of other Commonwealth statutes which impose penalties, including the *Corporations Act 2001* (Cth) and the *Competition and Consumer Act 2010* (Cth).

BACKGROUND TO THE HIGH COURT DECISION

We reported on the New South Wales Court of Criminal Appeal ('CCA') decision in an earlier update.[1]

The CCA proceedings concerned an appeal against the sentence imposed on Jacobs Group for conspiring to cause bribes to be offered to foreign public officials, contravening sections 11.5 and 70.2(1) of the Criminal Code.

The relevant conduct was engaged in by Sinclair Knight Merz Pty Ltd ('SKM'). SKM was involved in two conspiracies in the Philippines and Vietnam where bribes were paid to foreign officials in order to facilitate the awarding of public infrastructure project contracts to SKM. This conduct involved making payments to third party companies and receiving fake invoices for services which were not provided.

SKM was subsequently acquired by Jacobs Group. The conduct came to light during Jacobs Group's due diligence carried out in advance of that acquisition. On becoming aware of the conduct, Jacobs Group reported it to the Australian Federal Police ('AFP') and went on to give significant assistance to the AFP with investigations over a six year period by providing business records, draft witness statements, factual analyses, and arranging for the AFP to interview relevant employees.

SENTENCING OUTCOME

Upon pleading guilty to three offences, Jacobs Group was required to pay a pecuniary penalty of $1.35 million. In her sentencing remarks, Justice Adamson of the New South Wales Supreme Court observed that while the offending fell within the mid–

range of objective seriousness, Jacobs Group's contrition and remorse for the offending, self–reporting, and the considerable assistance it gave to the AFP meant that significant sentencing discounts were appropriate.

The key issue for the subsequent appellate proceedings was her Honour's interpretation of section 70.2(5) of the Criminal Code. This section applied to only one of Jacobs Group's three offences, owing to the time at which the section came into force.

Section 70.2(5) provides that, where it is possible to determine the value of the benefit that a company obtained from the offending, the maximum penalty is the greater of 100,000 penalty units ($11 million at the time of the offence), three times the value of that 'benefit', or 10 per cent of annual turnover of the company in the year the offence occurred. Justice Adamson interpreted 'benefit' to mean the net benefit the company gained from the conduct, rather than the gross value of the contracts it procured as a result of the conduct. The practical result of this interpretation was to reduce the maximum available penalty for the third offence from approximately $30.4 million to $11 million.

COURT OF CRIMINAL APPEAL JUDGMENT

As we noted in our previous update,[2] the New South Wales CCA (Bell CJ, Walton and Davies JJ) declined to interfere with the sentencing outcome.

The CCA accepted the correctness of Justice Adamson's approach to interpreting section 70.2(5). The court reasoned that the value [to the offender] of the benefit of a contract procured through bribery lay 'in the opportunity for monetary gain from its performance', noting that 'there will simply be no benefit to an offender if the body corporate that has engaged in the bribery breaks even or makes a loss from its contractual performance'. (at [95]).

Having regard to these matters, and finding that there was nothing in the Explanatory Memorandum supporting the 'gross value' construction contended for by the Crown, the CCA accepted that Adamson J was correct in construing 'benefit' as what the company 'in fact gained from the conduct' (at [99]); which is to say, 'benefit' is to be construed as the 'net benefit'.

ARGUMENT BEFORE THE HIGH COURT

The Crown appealed the New South Wales CCA's conclusion on how to determine the maximum penalty for the third offence, having regard to what the legislature meant by 'benefit'.

CROWN'S SUBMISSIONS

The Crown submitted that having regard to the text, context and purpose of section 70.2(5)(b), 'the value of the benefit' should properly be construed as the contract price without deductions for the costs of performing the contract.

The Crown argued that parliament did not use the word 'profit' (where it might have done so had it meant 'net benefit'). It was possible that a contract to perform work may break even or be performed at a loss but could still produce an advantage by allowing a corporation to obtain a foothold in a market and providing employment.

The Crown also put emphasis on the purpose of section 70.2(5), being to 'stamp out' the harm caused to Australia and to 'international good governance and commerce' caused by foreign bribery. The extrinsic materials to the legislation (the Explanatory Memorandum, the Second Reading Speech and the OECD report on bribery in international transactions), all pointed to section 70.2(5) being directed towards ensuring that the penalty for foreign bribery was not 'a mere cost of doing business'.

JACOBS GROUP'S SUBMISSIONS

Jacobs Group submitted that both the primary judge and the New South Wales CCA correctly construed the value of the benefit in the legislation to be the 'net' benefit, i.e. the value of the contract, less the expenses incurred (save for the 'tainted' expenses of the bribe itself).

THE HIGH COURT'S JUDGMENT

In a joint majority judgment, Chief Justice Kiefel and Justices Gageler, Gordon, Steward, Gleeson and Jagot allowed the Crown's appeal. They directed that the New South Wales CCA redetermine the sentence on the relevant offence. Justice Edelman, in a separate judgment, agreed with the majority's orders.

In short, the court found that section 70.2(5)(b) required 'the value of the benefit' to be determined as the total amounts received under the contract, with no deduction to be made for any costs incurred by Jacobs Group in performance of the contract.

The majority found that the context and purpose for which section 70.2(5) was introduced, was:

... to increase the fine for legal persons for the offence of bribing a foreign public official to a level that is effective, proportionate, and dissuasive within the meaning of Art 3.1 of the OECD Convention.

This required that the provision could be construed to 'yield a certain content, capable of consistent application'.

The majority also accepted the Crown's submissions that a party who breaks even or makes a loss

The High Court's decision underscores the intent of both legislative and judicial branches of government to aggressively discourage Australian companies from bribing foreign public officials, and from conspiring with others to do so.

on a contract, may still receive a benefit from the performance of the contract. For example, such a contract could be a part of a loss leader strategy in a new and foreign market.

The court rejected the distinction between 'tainted' and 'untainted' costs of performing a contract contended for by Jacobs Group. It took the view that the whole of any advantage secured by a bribery offence is tainted by the illegality, as are all costs incurred.

Another reason given for not accepting the 'net' benefit reading was a concern that it would introduce a new highly contested field of battle just to resolve the maximum penalty, which would tend to undermine the purpose of ensuring 'effective, proportionate and dissuasive' penalties for bribery offences as required by the OECD Convention.

The majority also found that, in any event, costs incurred by a party in performing a contract corruptly procured could be taken into account in the 'instinctive synthesis' undertaken by a court in weighing the different sentencing factors. That is, while such costs could not be taken into account in applying the legislative formula for calculating the maximum applicable penalty, they could potentially be one of a number of factors considered by a trial judge 'to ensure the penalty imposed is proportionate to all circumstances of the offence'.

THE WAY FORWARD

The High Court's decision should be seen as a 'win' for prosecutorial authorities, as it could significantly expand the potential maximum pecuniary penalties that corporations may have to pay for engaging in foreign bribery.

Jacobs Group's penalty, for example, was calculated having regard to the maximum available penalty for an offence of this type being $11 million, but this will now need to be redetermined by the New South Wales CCA in light of the High Court's finding that the maximum available penalty is approximately $30.4 million.

The High Court's decision underscores the intent of both legislative and judicial branches of government to aggressively discourage Australian companies from bribing foreign public officials, and from conspiring with others to do so.

The High Court's decision also has potential implications for the calculation of maximum penalties for other corporate offences. Formulations similar to the 'three pronged' approach to calculating a penalty under section 70.2(5) of the Criminal Code are used in a number of other Commonwealth statutes which impose financial penalties on companies for breaches, including the *Corporations Act* and the *Competition and Consumer Act*.

REFERENCE

1. https://www.ashurst.com/en/insights/r-v-jacobs-group-seeking-redemption-in-a-self-report-of-bribery/

2. See above n1.

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PROPOSED NSW 'FITNESS FOR PURPOSE' OBLIGATION CREATES AN ADDITIONAL LAYER OF LIABILITY FOR ENGINEERS

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AT A GLANCE

The New South Wales government has proposed a practice standard for engineers, which includes imposing a new obligation to ensure that designs for professional engineering work are 'fit for purpose'.

However, the existing regulatory framework for professional engineering work within the *Design and Building Practitioners Act 2020* (NSW) (DBP Act) and Regulation[1] already deals with the problems identified in the Regulatory Impact Statement, which the proposed change responds to.

While the practice standard will not create a statutory duty, its introduction as a condition of registration will create a de facto statutory 'fitness for purpose' obligation on engineers.

This article discusses the content of the proposed change, its likely consequences, and whether it is really needed.

INTRODUCTION

The New South Wales government has proposed a practice standard for engineers, which includes imposing a new obligation to ensure that designs for professional engineering work are 'fit for purpose' (the obligation).

The consultation period for feedback on the draft practice standard closed on 18 August 2023. It is now currently under review by the Department of Customer Service.

The practice standard is proposed as a condition of registration for New South Wales engineers and it is an offence to contravene a registration condition. The Regulatory Impact Statement says that:

...the fitness for purpose obligation would be enforceable by the building regulator as a condition of registration.

While the practice standard will not create a statutory duty, its introduction as a condition of registration will create a de facto statutory 'fitness for purpose' obligation on engineers.

THE PRACTICAL EFFECT OF THE OBLIGATION

The Regulatory Impact Statement says that the obligation is intended to:

... sit separately from the duty of care established by the DBP Act and would not operate as an extension or expansion of that duty.

However, the obligation will impose a higher duty on engineers than the usual tortious duty to exercise reasonable skill and care. This is because it will create an obligation to achieve a specified result—a breach of which will not require proof of negligence. This is in contrast to the standard of care set out in section 50 of the *Civil Liability Act 2002* (NSW), which is based on competent professional practice. The obligation is a departure from that standard.

The obligation's practical effect will be to expand engineers' liability beyond the scope of liability governed by the statutory and common law duties of care.

This is because:

- the practice standard will require engineers to include a 'statement of purpose' in client contracts—this involves including an express term, a breach of which will expose engineers to breach of contract claims, and
- the obligation will require engineers to ensure that designs for engineering work comply with the National Construction Code ('NCC') and the 'design brief'. The Regulatory Impact Statement states that the design brief:

... defines and clarifies the project requirements to the proposed building work ...

and

... should set out any elements considered essential or desirable by the client for the project.

The consequence of requiring engineers to contractually agree on a 'statement of purpose' will be their increased liability.

GUARANTEE OF END RESULT?

The Regulatory Impact Statement says that:

The proposed practice standard does not place an obligation on the Professional Engineer to ensure that the construction or end product is fit for purpose.

However, when assessing whether engineering work is fit for purpose, among other things, the following factors will be considered:

- whether the work complies with contractual requirements that define agreed outcomes, and include a 'statement of purpose' for which the engineer's services are provided;
- whether the engineer has taken steps to coordinate with other designers working on the project to deliver the intended outcome; and
- whether the engineer has provided guidance to the builder on how to implement the engineering works.

While the obligation is not intended to place a duty on engineers to ensure that the end product is fit for purpose, the reality is that it is unlikely to be confined in that way. This is because the criteria for assessing whether an engineer's design is fit for purpose includes the engineer taking steps to:

- identify and agree on the intended purpose or outcome;
- coordinate with other designers to achieve the intended outcome; and
- guide the builder to achieve the intended outcome.

Those requirements will likely result in engineers being much more actively involved in the construction phase.

The draft practice standard confirms that:

... it is expected that professional engineers play a proactive role in all stages of the build process and will attend sites as necessary to see that work is being carried out in accordance with designs.

This may result in more disputes between engineers and builders about where the responsibility to achieve the intended outcome lies.

Currently, the rationale for imposing fitness for purpose obligations on builders is that they are akin to sellers of goods because they produce the finished product. In contrast, professional advisors provide a service.

If the obligation is imposed, more of the builders' responsibility and risk will become shared with engineers who will not have the same close and day–to–day familiarity with projects. The obligation could relieve builders of some liability, or at least provide builders with another way of sharing liability.

UNINSURED EXPOSURE

Insurance in Australia for construction professionals does not cover all liability. Professional indemnity insurers are generally not willing to offer cover for the full range of contractual liabilities, regardless of the profession.

In principle, a professional indemnity policy is not intended to be a fund guaranteeing the intended outcome of professional services. Where a professional nevertheless binds themselves to achieving a result, insurers commonly exclude such undertakings from cover.

This is achieved by excluding cover for assumed contractual liabilities that increase a professional's exposure to a level that would not otherwise exist.

Contractual liability exclusions in professional indemnity policies almost always expressly exclude liability assumed by an insured for the fitness for purpose of its professional services. Specifically, any liability arising from a 'statement of purpose' included in the relevant contract is not likely to be covered.

Accordingly, the obligation will likely create insurance problems for engineers that are disproportionate to the regulatory policy objectives.

CURRENT FRAMEWORK AND THE FITNESS FOR PURPOSE OBLIGATION

The Building Confidence Report[2] found that, among other things, inadequate design documentation and compliance of designs with the NCC was a widespread problem. The New South Wales government embraced the report's recommendations, which resulted in the wholesale regulatory overhaul of the New South Wales building industry. The changes included the DBP Act and Regulation, including the requirement to produce regulated designs and design compliance declarations.

The current framework in the DBP Act requires:

- regulated designs to be prepared for building elements; and
- design compliance declarations for regulated designs to be provided to a builder for the purpose of construction.

Arguably, these requirements adequately resolve the issues the obligation seeks to address.

By declaring a regulated design, a design practitioner (i.e. an engineer) declares that the design contains the final level of detail necessary to support the building work.

Design compliance declarations must cover whether:

• a regulated design complies with the Building Code of Australia ('BCA');

• the regulated design complies with the regulations, including integration with other aspects of the building/other regulated designs to which the regulated design relates;

• other standards, codes or requirements have been applied in preparing the design; and

• any building product referred to in the design would, if used in a way that is consistent with the design, comply with the BCA.

Building work cannot start until the builder has lodged the 'for construction' regulated designs. This set of designs must contain the detail necessary to produce building work that will comply with the BCA, including specifying the proposed dimensions of the completed building, the characteristics and materials comprising the proposed building, and the location of building elements.[3]

The New South Wales requirements for regulated designs and compliance declarations are the most precise and stringent in Australia. Those requirements have been carefully developed following a review of the recommendations in the Building Confidence Report, and a thorough industry–wide consultation process.

It is worth noting that these changes have only been in place for two years (since 1 July 2021).

If engineers follow the current requirements for regulated designs and design compliance declarations, they will comply with the relevant standards. As a result, the issues identified as creating the need for the obligation fall away.

CONCLUSION

The proposed obligation will likely result in increased liability exposures for engineers. These exposures are unlikely to be covered by most insurance products currently available in the Australian market. This means the obligation will create an extra layer of liability and insurability issues that may be disproportionate to its intended purpose.

Given the new regulatory framework implemented for professional engineering work within the DBP Act and Regulation adequately deals with the problems identified, the obligation may not be necessary at all.

The Department anticipates that the practice standard will be published shortly, with a transitional period before it becomes mandatory. We will continue to monitor how this progresses and will keep you informed of developments.

REFERENCES

1. [Design and Building Practitioners Regulation 2021 (NSW)].

1. Report entitled 'Building Confidence' by Peter Shergold and Bronwyn Weir, dated February 2018.

2. Clause 7.3 of the Design Practitioners Handbook.

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