Construction Update

DEC 2022 ISSUE 1

IN THIS ISSUE

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Welcome to the 2022 issue of the Construction Update.

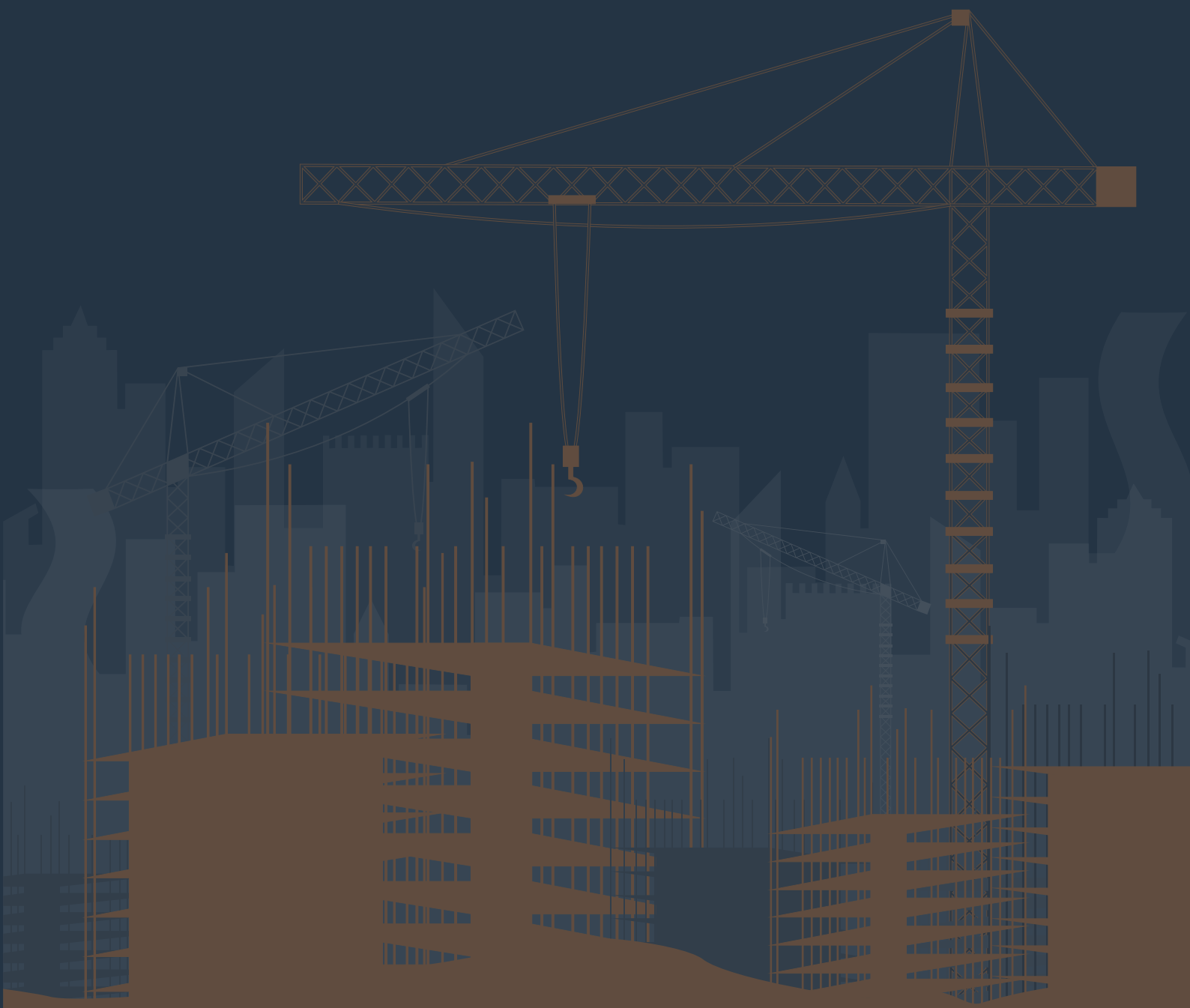
In this issue we address the state of the building and construction industry and reflect on the challenging year that has passed and the outlook for 2023. We make a brief statement relating to insolvencies—which could be an entire update in itself—and outline two relevant decisions.

We also provide a summary of some significant legislative and regulatory changes implemented throughout Australia. It is apparent that some jurisdictions are well progressed and others are in the early stages of the reform process.

Finally, we outline a sample of decisions relating to disputes, including alternative dispute resolution, recourse to security and guarantees, contractual disputes, defects and limitations.

We hope you find this issue informative and useful. If you would like any further information on the issues raised in this paper, please contact Kiley Hodges.

PART ONE
STATE OF THE INDUSTRY



STATE OF THE BUILDING AND CONSTRUCTION INDUSTRY

Author: Partner Kiley Hodges

2022 was an incredibly challenging year for the building and construction industry. Unpredictable events led to unsustainable price increases and supply and labour shortages; and liquidity was affected with construction companies being overrepresented with insolvencies accounting for 30% of all company insolvencies.[1] Reform is underway but, more change is needed to maintain a strong and sustainable industry.

A challenging year

Over 25% of the largest 200 builders in Australia recorded an operating loss in the year to March 2022, up from approximately 15% in the prior year.[2] There has been a significant spike in insolvencies, including from large and high-profile companies. These collapses have impacted both large and small industry participants forcing them to become unwilling creditors, writing off debts and making adjustments to building models accordingly.

The industry's challenges have come in the form of:

- prolonged and severe wet weather and flooding, which has caused significant delays in activity across the construction industry, impacting the critical path and leading to delay claims
- COVID-19 related supply chain disruptions and geopolitical instability, which led to increased cost of materials and freight. In some cases, this has been up to 70 per cent[3]
- reduced availability of skilled labour and increased labour costs
- increased debt servicing costs and reduced borrowing capacity resulting from higher interest rates, and
- an end to the Australian Taxation Office's (**ATO**) moratorium on enforcement activities on unpaid tax, with more than 52,000 letters warning of possible Director Penalty Notices (**DPN**) issued in March 2022, 30-40 DPNs being issued daily, 300 notices declaring an intent to disclose business debts, and notices to credit reporting agencies of outstanding obligations.[4]

Due to the unpredictable nature of these factors, the associated costs had not been built into profit forecasts and budgets. The pipeline of existing work has caused the greatest problem, with the industry typically having slim margins, a high prevalence of fixed-price contracts with long lead times and no rise and fall clauses, and limited options to address escalating costs.

1 Reserve Bank of Australia Financial Stability Review, October 2022
2 Reserve Bank of Australia Financial Stability Review, October 2022
3 Australian Constructors Association 2022 Year in Review, November 2022
4 https://www.smartcompany.com.au/finance/tax/ato-director-penalty-notice-tax-debt/

Cost pressures have been exacerbated by a lack of productivity in the industry as a result of:

- inefficient procurement processes
- inappropriate contractual risk allocation (leading to time wasted dealing with disputes)
- difficult payment terms (requiring contractors to fund projects for extended periods)
- overly prescriptive specifications
- lack of availability and accuracy of information on location of utilities
- cultural issues
- complex project governance
- contractual requirements resulting in widespread double insurance
- lack of investment in digital engineering
- inconsistent rules and regulations across jurisdictions, and
- outdated and inflexible workplace practices.[5]

Actions taken to alleviate the 2022 pressures have included:

- Renegotiating existing contracts. For example, builders that predominantly work with other developers instead of retail buyers have been able to switch to more flexible contracts that allow them to pass higher materials or labour costs onto their customers even after the contract is signed.[6] However, this option is not available to all industry participants.
- Reducing labour spend. Depending on where these changes are made, this could cause problems when those resources are needed down the track.
- Diversifying revenue streams to reduce reliance on a sole source of income and reduce the risk of that entity becoming insolvent.
- Drawing down on cash reserves to supplement operating losses or engage in equity raising. While this maintains short term liquidity, it is not a sustainable long-term solution.
- Raising prices, shortening payment times and shortening quote acceptance times for new contracts and quotes.

2023 outlook

Following the eighth consecutive interest rate rise[7], further insolvencies are expected in 2023 as economic activity slows and vulnerable businesses draw down further on cash buffers. However, there are positive signs.

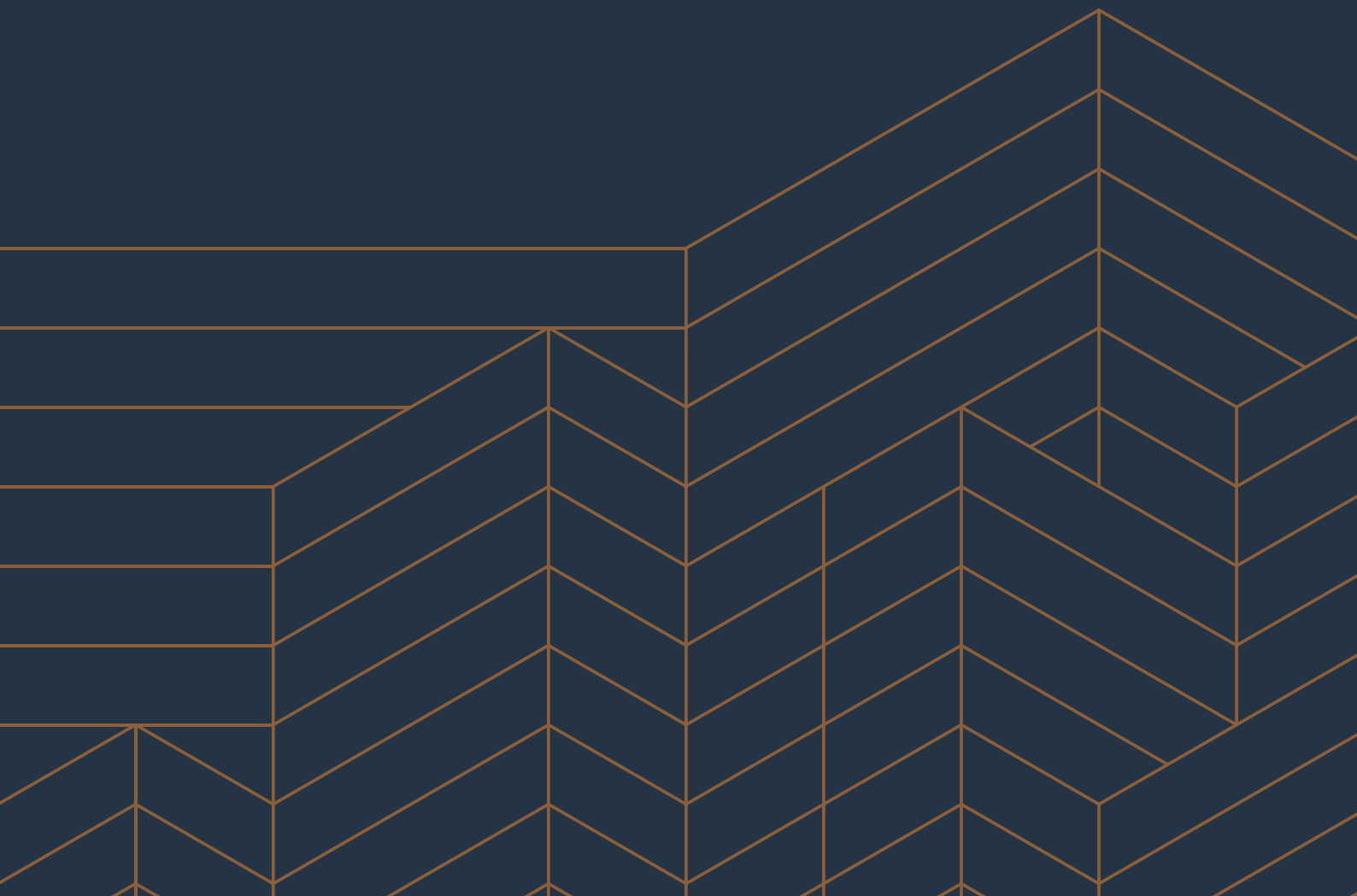
- There is a large pipeline of work in the residential and commercial sectors.
- The pronounced acceleration in the push to decarbonise the economy is creating a pipeline of opportunities for some businesses.
- State and federal governments and industry participants are actively reviewing changes that can be made to address the stability of the industry.
- Adjustments are being made to risk sharing models with, for example, an increase in collaborative contract models reported by some participants.

Companies that are able to rely on cash buffers and adjust their contracts and business models are likely to survive the challenging economic conditions in the year ahead. However, government assistance and intervention is essential.

[5] Australian Constructors Association Submission to the Productivity Commission 2022
[6] Reserve Bank of Australia Financial Stability Review, October 2022
[7] As at December 2022

INSOLVENCIES

The building and construction industry has always been prone to insolvencies and illegal phoenixing. However, 2022 has seen a sharp rise in the number of insolvencies and a broader range in the type of companies affected. The impact is being felt at all levels of the industry, as well as by governments and in the broader economy. Illegal phoenixing is high on the radar of governments and industry alike.



THE RISE OF THE ANTI-PHOENIX: FIRST AUSTRALIAN DECISION TO CONSIDER ILLEGAL PHOENIXING FOLLOWING 2020 REFORMS

Author: Partner Kiley Hodges
Acknowledgment: Partner Shane Williamson

The recent case of In the matter of *Intellicomms Pty Ltd (in liquidation)* [2022] VSC 228 (**Intellicomms case**) was the first to consider the s 588FDB creditor-defeating disposition provision in the *Corporations Act 2001* (**Act**), which was introduced to combat illegal phoenixing of a company and provide guidance on the evidence necessary for a liquidator, or other eligible applicant party, to successfully establish a phoenix had taken place and seek orders for the undoing of the transaction.

This was a case of blatant illegal phoenixing. Nonetheless, as the first decision to consider the creditor-defeating disposition provisions, the Intellicomms case provides helpful guidance on the proof required to establish that the impugned assets were disposed of for less than market value and the best price that was reasonably obtainable by the company for the property, having regard for the circumstances existing at the time so as to establish a right to clawback property transferred as part of a phoenix.

Read our detailed article here.

SHOW ME THE (LACK OF) MONEY: EVIDENCE OF INSOLVENCY A MUST IN COURT

Author: Partner Dino Liistro

WGE Pty Ltd v Morris, 13 April 2022, Williams, J, NSWSC

This case concerned an application by a creditor, WGE Pty Ltd (**WGE**), against John Morris, the sole director of Coffey EMS Pty Ltd (in liq) (**Coffey**). WGE, that had provided design, fabrication, supply and installation services to Coffey, alleged that Coffey went into administration and subsequently liquidation owing it the amount of $182,102.25. WGE commenced proceedings for insolvent trading against Morris.

The NSW Supreme Court dismissed the proceedings with costs, as WGE failed to prove that Coffey was insolvent at the time it incurred debts to Coffey or because of those debts.

WGE had relied on evidence from a senior manager employed by the administrator, who was a chartered accountant that had conducted an investigation into the solvency of Coffey. The Court found the investigation did not amount to a substantive enquiry of the solvency position of Coffey and was therefore insufficient to prove it was insolvent. The Court criticised WGE for failing to adduce evidence of all of Coffey's debts, the dates they were incurred and the dates they were due and payable, and then in failing to determine and consider these against the projected net cashflow of the company.

This case highlights that the party bearing the onus of proof in an insolvent trading claim must adduce sufficient (and in some cases reasonably substantial) evidence to support a claim and prove each of the requisite elements of insolvency. It demonstrates that unpaid invoices do not demonstrate that a company was insolvent at the time they were incurred merely because they remained unpaid when the company entered administration. For relatively small claims, such as these (i.e. under $200,000), insolvent trading proceedings are unlikely to be commercial in light of what needs to be proved to make good an insolvent trading claim.

PART TWO
LEGISLATIVE & REGULATORY CHANGE

Widespread legislative and regulatory changes are being implemented throughout Australia. Some jurisdictions are well progressed and others are in the early stages of the reform process. In the following pages we provide a summary of some of the most significant changes seen in 2022.

We note that, apart from a brief mention of developments in Western Australia, security of payment changes are beyond the scope of this update.

CRITICAL INFRASTRUCTURE PROTECTION: LEGISLATIVE UPDATE

Author: Partner Jehan Mata
Acknowledgment: Georgia Mineo

In our previous articles of March and July, we discussed the *Security Legislation Amendment (Critical Infrastructure Protection) Act* 2022 (**SLACIP Act**) coming into force, amending the *Security of Critical Infrastructure Act* 2018 (**SOCI Act**), and introducing the following key measures:

- a new requirement for responsible entities to create and maintain a critical infrastructure risk management program, and
- a new framework for enhanced cyber security obligations required for operators of systems of national significance.

Since then, consultations have continued between the Government and industry partners to ensure the above measures are not a regulatory burden on the industry. Consequently, the Minister of Home Affairs undertook consultations on the proposed risk management program between 5 October 2022 and 18 November 2022.

The risk management program rules can be found within the *Security of Critical Infrastructure (Critical Infrastructure risk management program) Rules* (LIN 22/018) 2022. Essentially, the program focuses on four key hazard areas: cyber and information security, personnel hazards, supply chain, physical security hazards and natural hazards.

The Minister of Home Affairs has proposed to apply the program requirements to the following critical asset classes:

Read more about our cyber and privacy capabilities on our website.

NATIONAL CONSTRUCTION CODE 2022

Author: Partner Patrick McGrath
Acknowledgment: Claire Gomo

The *National Construction Code 2022* (**NCC 2022**) will be adopted by all states and territories on 1 May 2023 however, there are transitional periods to give the building industry additional time to transition to the new Code.

The NCC 2022 sets out the requirements for the design and construction of buildings in Australia, including plumbing and drainage work. It sets the minimum required level for the safety, health, amenity, accessibility and sustainability of certain buildings.

The NCC 2022 will incorporate major changes including, for example:

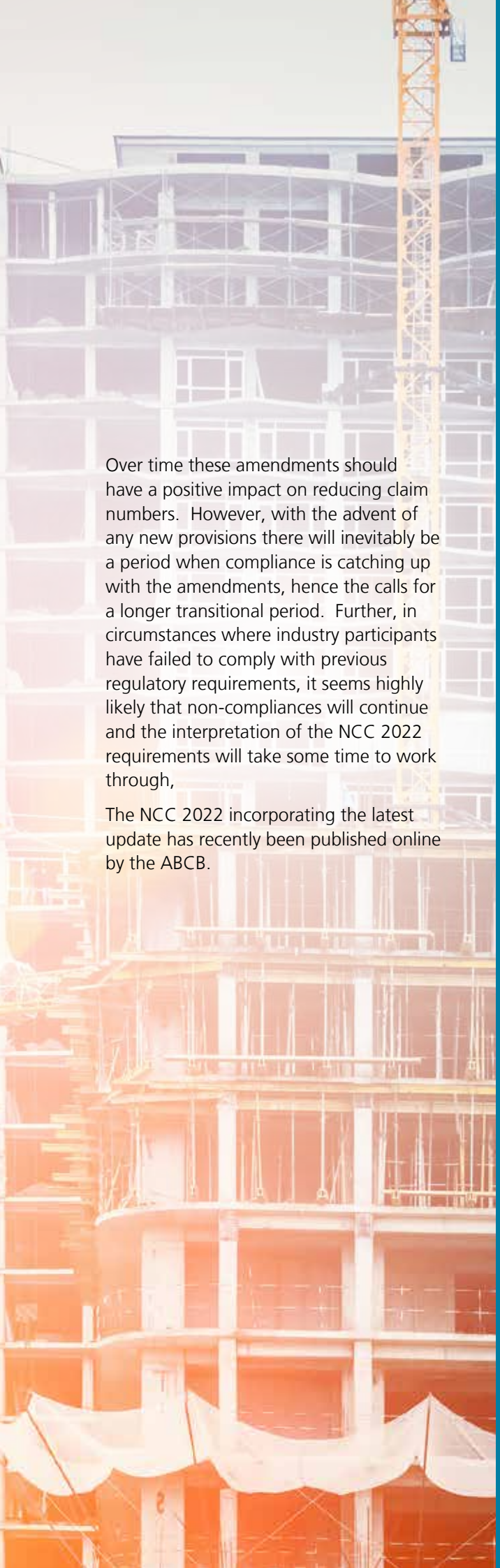
- New liveable housing requirements for Class 1a buildings (houses and townhouses) and Class 2 sole-occupancy units (individual apartments) incorporating features based on the *Livable Housing Design Guidelines* and imposing obligations to construct homes with higher efficiency requirements from 1 October 2023.
- Lead free plumbing products are to be used from 1 September 2025.
- Amendments to fire safety requirements for external walls clarifying concessions from non-combustibility requirements and cladding related reforms.
- New deemed to satisfy provisions for waterproofing of wet areas and additional deemed to satisfy provisions providing solutions for weatherproofing of external walls.

The NCC 2022 provisions represent the largest individual amendment made to the national Building Code since its inception more than 25 years ago. Despite the proposed 12-month transitional period from October 2022, industry groups have been advocating for a longer transitional period (up to three years) prior to the commencement of the NCC 2022. However, at this stage the only delays announced have been modest, with the most recent delay announced to enable the Australian Building Codes Board (**ABCB**) to make editorial changes. The corrections do not change the effect of the provisions. The ABCB is also undertaking a final quality control review of the new *Livable Housing Standard* to ensure compatibility with other provisions of the NCC.

Whereas improvements in the energy efficiency of new homes will positively impact household energy bills, concerns have been expressed that the changes to the NCC will have adverse consequences for construction budgets, with thousands of dollars to be added to the overall cost of new homes. The Master Builders Association of Queensland has anticipated the changes will add an average of $30,000 to the overall construction cost for each build. This is a significant increase from initial government estimates of $6,000.

Despite the expected cost increases, the NCC 2022 contains measures that have been described by the Department of Climate Change, Energy, the Environment and Water as "vital to support the economy's transition to net zero".

From a claims perspective, the past few years have seen substantial increases in the number and value of disputes relating to external cladding as well as fire separation between dwellings and waterproofing defects. Certain aspects of the NCC 2022 are plainly geared towards clarifying requirements and improving overall construction practices in connection with these well-litigated areas.



Over time these amendments should have a positive impact on reducing claim numbers. However, with the advent of any new provisions there will inevitably be a period when compliance is catching up with the amendments, hence the calls for a longer transitional period. Further, in circumstances where industry participants have failed to comply with previous regulatory requirements, it seems highly likely that non-compliances will continue and the interpretation of the NCC 2022 requirements will take some time to work through,

The NCC 2022 incorporating the latest update has recently been published online by the ABCB.

NEW UNFAIR CONTRACT TERM PROHIBITIONS AND PENALTIES INTRODUCED

Author: Partner Kiley Hodges
Acknowledgment: Nick Christiansen

Treasury Laws Amendment (More Competition, Better Prices) Act 2022

The Treasury Laws Amendment (More Competition, Better Prices) Act 2022 (Cth) was assented to on 9 November 2022. The Act sets out a new unfair contract term regime in the *Competition and Consumer Act 2010* (Cth).

Standard form contracts are commonly used in the construction industry. For example, the Australian Standard suite, International Federation of Consulting Engineers (FIDIC) forms, GC21, NEC and ABIC MW. Many companies also have their own standard contracts used for all projects.

It is expected that many construction contracts, particularly subcontracts, will be impacted by these changes. Further detail on the changes can be found in our article here.

FAIR WORK LEGISLATION AMENDMENT (SECURE JOBS, BETTER PAY) ACT 2022

Author: Partner Kiley Hodges

The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Act 2022* (**Act**) is now in force. Our articles about the operation of the Act including updates to measures to deal with and eliminate sex discrimination and sexual harassment, flexible working arrangements and resolving disputes, family and domestic violence leave, pay secrecy and fixed term contracts are available on our website.

Relevantly to the building and construction industry, the Act provides for abolition of the Australian Building and Construction Commission (**ABCC**) on 6 February 2023. The ABCC's role enforcing the *Fair Work Act 2009* was transferred to the Fair Work Ombudsman on 10 November 2022. The ABCC is currently in a transition period, to enable transfer of responsibilities to the Fair Work Ombudsman.

PROFESSIONAL REGULATION - ARCHITECTS REGISTRATION BOARD CHANGES PROPOSED

Authors: Partner Patrick McGrath
& Special Counsel Claire Gomo

Until very recently the *Building and Heritage Amendment Act 2022* (Vic) was planned to be introduced to the Legislative Council in the last parliamentary sitting week before the Victorian State election on 26 November 2022.

The proposed changes would have amended the *Architects Act 1991* (Vic) and impacted the governance of the Architects Registration Board and the Register of Architects with a requirement to be inserted into the *Architects Act* compelling architects to provide proof of insurance every year to the relevant Authority.

However, in a decision that appears to have pleased the Architects Registration Board, the proposed legislation was shelved prior to the Victorian State Election. Whether it is revisited in light of the re-election of the Labor Government when the 60th Parliament begins sitting remains to be seen.

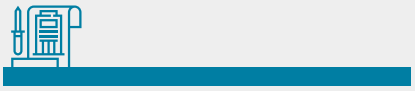
PROFESSIONAL REGULATION – BUILDING SURVEYORS AND OTHERS

Authors: Partner Patrick McGrath
& Special Counsel Claire Gomo

Substantial amendments have been proposed to the *Building Act 1993* (Vic) affecting Building Surveyors (Certifiers) and other professionals involved in building and construction work in Victoria.

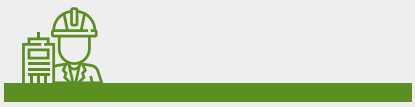
The *Building, Planning and Heritage Legislation Amendment (Administration and Other Matters) Bill 2022* (**Bill**) incorporates substantial changes that would impact the design and construction of class 2 buildings (residential apartments), including:

- requirements for Municipal Building Surveyors to inspect certain prescribed classes of buildings prior to the relevant building surveyor issuing an Occupancy Permit



- powers of the Municipal Building Surveyor expanded to engage others including a fire safety engineer to assist with the assessment of such prescribed buildings

- formalised role of the State Building Surveyor to, for example, issue binding determinations on the interpretation of technical standards and requirements for building and plumbing work



- creation of a new 'Building Monitor' role to support and advocate for consumers affected by domestic building issues

- establishing new categories for building practitioners including 'site supervisor', 'building consultant', 'project manager' and 'building designer', and

- expansion to Victorian Building Authority powers to obtain information from building practitioners and share information with other agencies.

The Bill was not passed and therefore lapsed as at the end of the 59th Parliament, on 1 November 2022.

It will be interesting to see whether the Bill is reintroduced when the new Victorian Parliament begins sitting following the recent State election.

FAIR JOBS CODE[8]

Authors: Partner Patrick McGrath & Special Counsel Claire Gomo

On 10 August 2022, the Victorian Government introduced the Fair Jobs Code (**FJC**), which sets out the standards and requirements that suppliers and businesses contracting with any Victorian Government agency must meet. The FJC will impact D&C contractors entering tender processes with the Victorian Government and came into effect on 1 December 2022.

The FJC is designed to ensure that "*suppliers tendering for threshold procurement contracts or high value*[9] [with the Victorian Government]*, and businesses applying for significant business expansion grants*[10] [from the Victorian Government]*, are recognised for treating workers fairly*".

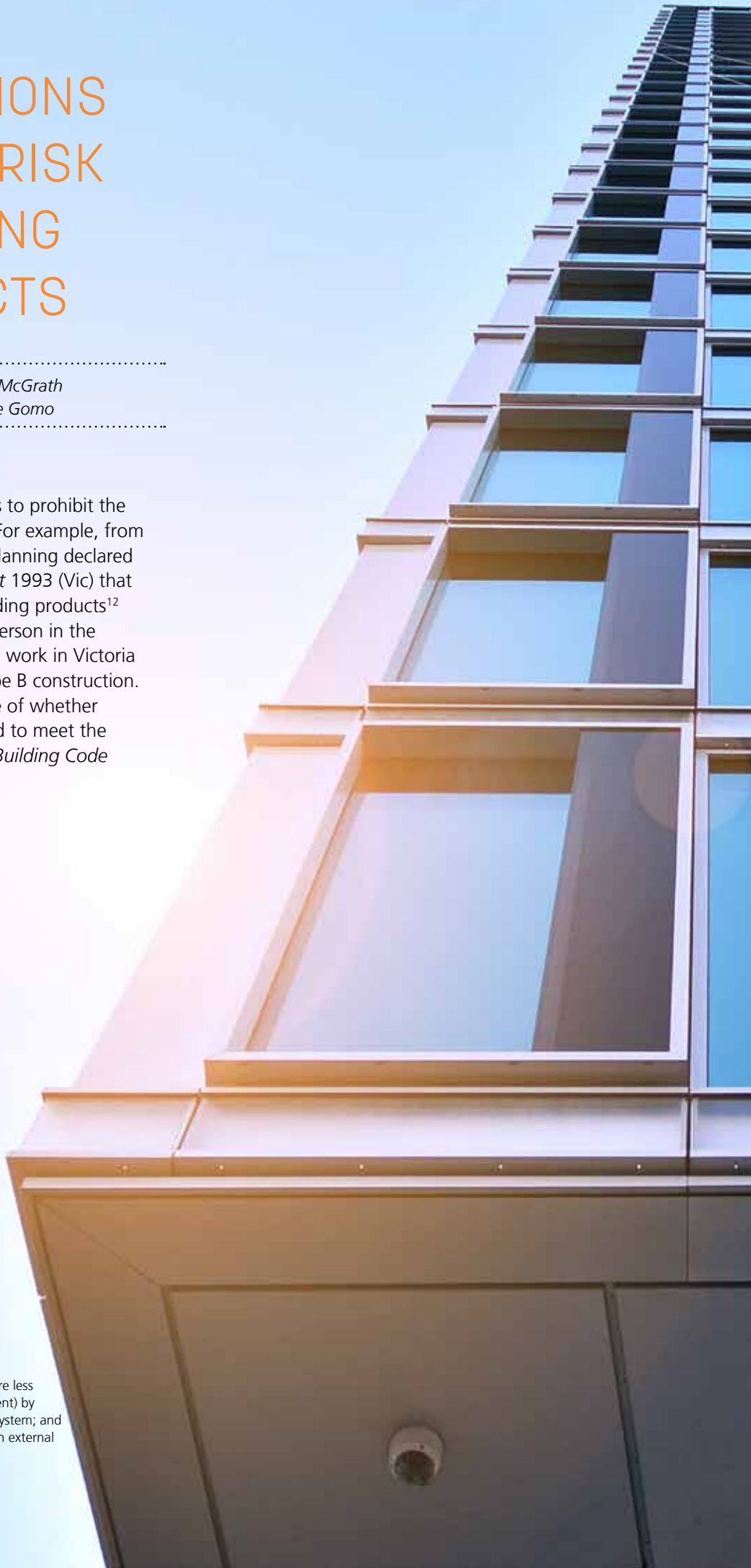
The FJC seeks to, for example: promote fair labour standards; secure employment and job security; encourage compliance with workplace laws; and foster cooperative and constructive relationships between employers, employees and their representatives. The process for assessing compliance with industrial relations and workplace health and safety laws operates through a pre-assessment certificate process.[11]

[8] https://www.premier.vic.gov.au/promoting-fairer-jobs-and-recognising-good-employers
[9] Affects procurement contracts worth $3M or more (excl GST).
[10] Applications for grants of over $500,000 (excl GST).
[11] Tendering businesses, including D&C Contractors will have to disclose employment, IR and WH&S breaches over the previous 3-year period and evidence of corrective action taken in response to any such breaches.

PROHIBITIONS ON HIGH-RISK CLADDING PRODUCTS

Authors: Partner Patrick McGrath & Special Counsel Claire Gomo

There have been continuing moves to prohibit the use of certain cladding products. For example, from 1 February 2021 the Minister for Planning declared under s 192B(1) of the *Building Act* 1993 (Vic) that certain high risk external wall cladding products[12] were prohibited from use by any person in the course of carrying out any building work in Victoria in connection with a Type A or Type B construction. This prohibition applies irrespective of whether a performance solution is proposed to meet the performance requirements of the *Building Code of Australia*.



[12] Aluminium Composite Panels (ACPs) with a core less than 93 per cent inert mineral filler (inert content) by mass in an external cladding as part of a wall system; and expanded polystyrene (EPS) products used in an external insulation and finish (rendered) wall system.

EXTENSIONS OF LIMITATION PERIODS FOR COMBUSTIBLE CLADDING CLAIMS

Authors: Partner Patrick McGrath
& Special Counsel Claire Gomo

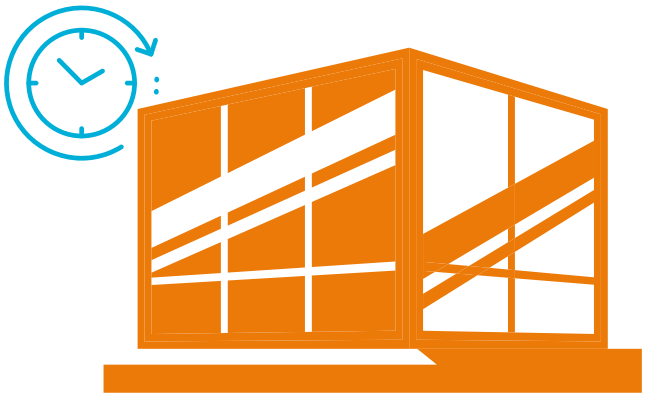
Under s 134(1) of the *Building Act* 1993 (Vic) a building action cannot be brought more than 10 years from the date of issue of the occupancy permit in respect of the building work (whether the occupancy permit was subsequently cancelled or varied), or if an occupancy permit is not issued, within 10 years of the issue of the certificate of final inspection for the building work.

Recently there have been legislative interventions undermining this well-understood 10-year long-stop limitation period, to enable owners of properties where combustible cladding was installed to bring claims beyond the 10-year time limit.

From 1 December 2020, the *Cladding Safety Victoria Act 2020* came into effect and extended the deadline for owners to commence legal proceedings in relation to combustible cladding claims from 10 to 12 years after the date of issue of the occupancy permit or certificate of final inspection in the case where no occupancy permit was issued.

Then, in October 2021 the *Building Amendment (Registration and Other Matters) Act 2021* came into effect. Under this Act, owners whose rights to commence legal proceedings for combustible cladding claims would have expired between 16 July 2019 and 1 December 2023 were given 15 years from the date of the occupancy permit (or certificate of final inspection) to initiate legal proceedings to cover the cost of removing and replacing combustible cladding.

Many D&C professionals involved in projects where combustible cladding was used have 'bulk notified' although they may have had regard to the standard 10-year limitation period when doing so. However, the extension of the limitation period to 15 years in some instances may result in claims being made in years to come that involve historical projects and are not statute barred. Cladding exclusions or insureds who have accepted substantially increased policy excesses may result in uninsured or under-insured losses.



iCIRT: NSW CONSTRUCTION INDUSTRY'S STAR-STUDDED HALL OF FAME

Author: Lawyer Alex Mitchell

The Independent Construction Industry Ratings Tool (**iCIRT**) is a 5-star risk rating register to assess businesses connected with residential building construction.

iCIRT was created by regulated ratings agency, Equifax Australasia, and is backed by the NSW Government as one of several pillars of reform introduced to weed out bad industry actors and raise building standards in the built form of residential projects across the State.

iCIRT ratings are voluntary. Applicants are currently limited to builders, developers, and certifiers but the system is poised to extend to industry consultants (including designers, architects, engineers), suppliers, and manufacturers in due course.

iCIRT gathers information from the applicant directly in addition to data obtained from a wide range of external contributors including the government, financiers, insurers, bureaus, and large suppliers. Equifax will examine this data and determine a star-rating on the applicant's capability, conduct, character, capacity, capital, and counterparties. The rating types are then classified by the level of assessment:

- *bronze* for a brief review using public and proprietary data
- *silver* for a standard review with limited disclosure from the applicant, and
- *gold* for a detailed, comprehensive assessment.

The higher the rating tier and the number of stars, the more confidence buyers and industry players can have in a reliable built form outcome.

Only entities with three or more gold stars are included on iCIRT's public register.[13] At present, the register lists 33 practitioners that have achieved this 'trustworthy' benchmark.

On 25 November 2022, Mirvac announced it was the first business to be awarded a five gold star iCIRT rating.

Risky players may be denied an iCIRT rating altogether – the NSW Building Commissioner, David Chandler, put the number of rejections at about one in five developer applicants.[14]

In an industry that accounts for a disproportionately high volume of insolvencies, iCIRT provides much needed risk visibility to buyers considering an investment and industry actors choosing associates.

The efficacy of the tool in identifying early warning signs of a failing building firm can be seen in Equifax's post-mortem assessment of failed big builder, Probuild.[15] Probuild's iCIRT rating dropped from 2.5 bronze stars in October 2019, down to 2 bronze stars by December 2020, and 1 bronze star in November 2021 before its collapse in February 2022.

Off the back of the first suite of iCIRT register publications, in early November 2022, NSW Fair Trading launched Project Intervene which purports to address serious defects in the common property of eligible Strata Schemes.[16] *Project Intervene* provides a mechanism for iCIRT-rated developers to voluntarily remediate their defects without enforcement action or new proceedings being brought by the affected owners' corporation.

Looking forward, Equifax has plans to expand iCIRT into other states and territories (with particular interest shown in Victoria and New Zealand).

It is important that industry actors across all states and territories prepare for the likely rollout of iCIRT to ensure high, early ratings and encourage consumer investment.

[13] https://www.buildrating.com/rating/registry
[14] https://www.smh.com.au/national/nsw/commissioner-s-plan-to-purge-lawyers-from-costly-fights-over-dodgy-buildings-20221114-p5by5p.html
[15] https://www.equifax.com.au/knowledge-hub/risk-solutions/case-study-new-industry-rating-tool-can-highlight-early-warning-signs-probuild-and
[16] https://www.nsw.gov.au/housing-and-construction/strata/project-intervene

REFORM TO NSW BUILDING STANDARDS

Author: Partner Dino Liistro

The NSW Government is looking to introduce new laws in response to the Public Accountability Committee's report from the "Further inquiry into the regulation of building standards", which are intended to improve safety, accountability and transparency, ensure high-quality design, construction and maintenance and modernise and simplify building legislation.

There are seven nominated areas of reform and the proposed reforms are wide reaching. For the purposes of insurers, the most relevant areas of reform relate to home building, the supply and use of building products and building compliance and enforcement.

Amongst the key proposed changes are:

Repealing and replacing the Home Building Act 1989 (**HB Act**).

The HB Act has been the principal piece of legislation regulating residential home building in NSW for the past 30+ years. Under the reforms, the HB Act will be replaced by the *Building Bill 2022* (**Building Bill**). The Building Bill will apply to residential and commercial construction, although a distinction between the two will be retained. Of most relevance, the Building Bill will contain amended statutory warranties applying to all residential building work, and under consideration are increased limitation periods for major defects (which will be known as 'serious defects') from six to 10 years and for minor defects from two to three years.

Supply and use of building products

Amendments to the *Building Products (Safety) Act 2017* (**BPS Act**) are proposed that are aimed at making manufacturers and suppliers more accountable for the building products they design, produce or supply, including requiring them to provide information to other participants in the supply chain regarding those products. Significantly for insurers, responsibility now lies with designers, architects, engineers and builders for the building products they specify and install.

Licencing

Certain commercial trade work will need to be licenced for the first time, whether for residential and commercial building work, including designers, engineers and others.

Strengthening building compliance and enforcement

Introducing the *Building Compliance and Enforcement Bill 2022*, which will create greater enforcement powers by regulators. Insurers will note that amongst the proposals is that a director or other person closely associated with a company can be held personally liable for an offence committed by a company.

The reforms are presently in the consultation phase. Submissions were open to 25 November 2022. It may well be that substantial changes are made before any reforms are implemented.

CURRENT POSITION AND DEVELOPMENTS IN QUEENSLAND

Author: Partner Kiley Hodges
Acknowledgment: Chantelle Reeves

In recognition of the impact that the building and construction industry has on job opportunities and economic growth, and the need for innovation and better processes, the Queensland Government is continuing to implement reforms outlined in the Queensland Building Plan 2017, updated in the Queensland Building Plan Update 2021 (collectively the **Plan**). The Plan guides policy and industry reforms to create a safer, fairer and more sustainable construction industry.

Actions taken in 2022 towards achieving the reforms include:

- **Project trust accounts.** On 1 March 2021, Project Bank Accounts (**PBA**) were replaced with a new trust account framework. The trust account framework is being gradually phased in for all eligible building and construction contracts valued at $1 million or more, including the government and private sector. From 1 January 2022, the roll out widened significantly so that the new rules also captured entities operating in the private sector of the construction industry. For further details, refer to our articles here and here.
- **Retention trust accounts.** The *Building Industry Fairness (Security of Payment) Act 2017* (Qld) specifies the requirements for establishing a retention trust account. A retention trust account is required to hold cash retentions withheld under a contract (where a project trust applies) until they are due to be paid. The retention amounts are withheld in trust for the benefit of subcontractors and the trustee. It has been rolled out in stages:
  - From 1 March 2021, the head contractor for the project trust contract who is withholding cash retentions from first-tier subcontractors was required to establish a retention trust account.
  - From 1 January 2022, the head contractor for the project trust contract who is withholding cash retentions from first-tier subcontractors and the private sector principal who is withholding cash retentions from the head contractor was required to establish a retention trust account.
  - From 1 October 2023, a retention trust account will be required for any contracting party down the contractual chain for a project trust project where they hold cash retentions. This captures principals, head contractors and some subcontractors.
- Undertaking a **review of the role of developers** in the building and construction industry. An independent Developer Review Panel (the **Panel**) was appointed by the Minister to identify practices and behaviours of developers that contribute to non-payment and insolvency in the industry; as well as consider the impact developers have on the quality and safety of design, construction and certification of buildings. The Panel released a Discussion Paper, following stakeholder consultation, canvassing the issues raised to date providing preliminary recommendations made by key industry players. Submissions in response to the recommendations are currently being accepted prior to the Panel providing its final report to Government. For further details, refer to our article outlining some of the key recommendations.

- Reviewing the **Queensland Home Warranty Insurance Scheme**. This has been led by the Department of Energy and Public Works. A subcommittee of the Ministerial Construction Council (**MCC**), the Government's peak building and construction industry advisory body, is also supporting the review. A Discussion Paper was released in March 2022, which includes proposals for further improvements to the Scheme. Following review of the consultation results, a policy response from MCC and the Government is expected in 2023.
- Independent review of the governance framework of the **Queensland Building and Construction Commission** (**QBCC**). The Review Report was delivered on 12 May 2022 and made 17 recommendations to support the transition of the QBCC into an insights-driven, customer and outcomes-focused regulator. The Government responded in June 2022 with a 90 day action plan, with changes to be rolled out over three years.
- The **Safer Buildings Taskforce** established by the Government continues to implement recommendations from the Building Confidence Report. Its aims are to:
  - oversee the ongoing assessment and rectification of combustible cladding materials
  - review the availability and quality of safer buildings program data, and
  - provide advice to the Minister on the need for a legislative framework to compel rectification of buildings affected with combustible cladding if necessary. For Government buildings identified with potentially combustible cladding, rectification is either proceeding or has been completed on 96% of the buildings. Completion of the rectification program is expected in 2024.
- The new **Building Policy Framework** has been implemented by the Government through a staged process and prospectively. It applies to Government agencies to the extent required for Best Practice Principles (**BPP**) projects from 31 March 2022. For all other construction projects (non-BPP), it applies to government agencies from 1 July 2023. The new framework consolidates and streamlines the four existing frameworks that govern how agencies plan, deliver and maintain Government building projects. It also incorporates BPP for major building construction projects including workplace health and safety systems and standards, commitment to apprentices and trainees, and best practice industrial relations.
- The ***Building Amendment Regulation 2022*** provided amendments to the *Building Regulation 2021* in response to matters raised by the industry, including:
  - extending the exemption period that allows building certifiers to hold professional indemnity insurance with an exclusion relation to external cladding from 30 June 2022 to 30 June 2023, and
  - clarification of inspection requirements for stages of assessable building work including who must inspect and approve stages of building work.

The reforms undertaken in 2022 are a result of the extensive reviews and stakeholder consultations conducted by the Government in implementing the Plan. The reforms outlined aim to continue to strengthen the building and construction industry, with further action items planned for the years ahead.

NT BUILDING REGULATIONS ACT AMENDMENTS

Author: Partner Garry Nutt
Acknowledgment: William Edyvane

In 2022, the NT Government introduced legislative reforms in respect of "complex" projects. The reforms arose out of issues regarding defective engineering design in recent years.

Specifically, on 29 December 2014, the Director of Building Control with the NT Department of Infrastructure, Planning and Logistics (**DIPL**) received a complaint regarding the design of strip footing a premise located in Darwin CBD.[17] Investigations subsequently undertaken by or on the behalf of the Director found alleged misconduct by one certifying structural engineer, John Scott.

The complaint itself was not dismissed; however, it was never referred to the Building Practitioner's Board. It wasn't until 31 May 2017 that, upon receipt of a further complaint, the Director conducted an audit of other projects that Mr Scott was certifying. By the end of this audit, the Director would have to refer complaints for a further 10 properties to the Building Practitioners Board. The auditor found that Mr Scott did not even possess the National Construction Code, which the auditor later had to provide to him.

On 11 January 2017, during construction on one of the projects Mr Scott was working on, "*substantial cracking*" was found on the first-floor transfer slab and a resulting inspection found also that the punching shear was under designed and was overstressing over most of the "*column/floor intersections*". The inquiry would further note "*Due to the sudden and catastrophic nature of a punching shear failure, with limited or no warning signs, the consequence of the under design was that the construction site had to be closed until the first-floor transfer slab was appropriately propped.*"[18]

Mr Scott was found guilty of professional misconduct for defective engineering design, failure to produce the required certificates and in instances, failure to complete or incorrectly completed Certificates of Compliance. A lot of Mr Scott's work was outside the scope of the inquiry when it was heard on 5 December 2019, as the work fell short of the time afforded by statute.

There was understandably some controversy regarding the Government's handling of the matter. Residents had purchased properties that had been privately concluded by DIPL to be structurally unsound. The period from when these concerns were known by DIPL to when the inquiry was publicly announced has been speculated to be around 15 months.[19]

In March 2021 the NT Minister for Infrastructure, Planning and Logistics, the Hon Eva Lawler, announced a number of legislative reforms to restore confidence in the local building industry including:

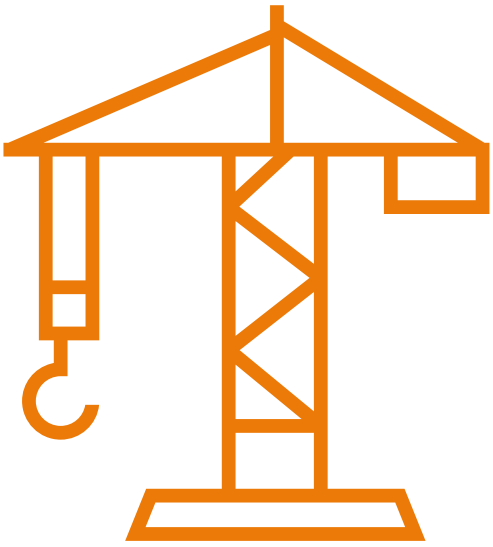
- establishing a framework for continuing professional development for building practitioners
- creating a new category of registration for commercial builders
- establishing a third-party peer review of the structural design of complex buildings – including buildings above three storeys
- increasing capacity to undertake physical audits on residential and other buildings, and
- increasing civil penalties for disciplinary action taken by Building Practitioners Board.

17 Building Practitioners Inquiry Board, *John Scott & JWS Consultants Pty Ltd*, Decision Notice (2020), [7].
18 Building Practitioners Inquiry Board, *John Scott & JWS Consultants Pty Ltd*, Decision Notice (2020), [81].
19 Jano Gibson, 'NT Government knew of structural flaws in Darwin buildings, but didn't tell owners' *ABC News* (Online, 8 August 2021) <https://www.abc.net.au/news/2019-08-08/nt-government-units-non-compliant-15-months-didnt-tell-owners/11392584>

Actions were taken in 2022 to implement these reforms and are expected to continue in 2023.

Firstly, the *Building Regulations Act 1993* (NT) was amended so that, from 31 January 2022, an independent third party review of structural designs for significant and complex buildings, including apartment buildings that have three or more storeys, is required.

Further, the *Building Amendment Act 2022* (NT) was passed on 28 July 2022, amending the *Building Act 1993* (NT) (**Act**). The Act provided the Building Practitioners Board with greater scope to conduct an inquiry into the work or conduct of a building practitioner whose registration has ceased (from three years to seven years) and increased the financial penalties for professional misconduct by building practitioners. The penalties were increased to around $26,000 for individuals and $130,000 for corporations. This is major step up from previous penalties which, at the time of the decision relating to John Scott (20 October 2020), were $6,320.



SECURITY OF PAYMENT REFORM

Author: Special Counsel Sarah Richards

Under Stage 1 of the reforms implemented under the *Building and Construction Industry (Security of Payment) Act* 2021 (**SOPA**), construction contracts for construction work, or the supply of related goods or services, entered into on or after 1 August 2022 are subject to a revised statutory framework. This includes a statutory right to payment, a statutory procedure for obtaining progress payments and a revised adjudication procedure. For construction contracts entered into before this date, the process under the *Construction Contracts (Former Provisions) Act 2004* will continue to apply.

Further reforms under the SOPA will apply to construction contracts entered into after 1 February 2023 and 1 February 2024. Key changes will relate to a mandatory retention trust scheme and the requirement to give notice before calling on security.

Duncan Cotterill

CHANGES TO THE CONSTRUCTION CONTRACT RETENTION MONEY SCHEME ARE ON THE WAY

Authors: Julia Flattery, Partner Duncan Cotterill
Jonathan Forsey, Special Counsel Duncan Cotterill

Changes to the construction contract retention money scheme are on the way

Amendments to the *Construction Contracts Act 2002* (**CCA**), which will strengthen and clarify the retention money scheme, have recently been considered by Parliament. Since being introduced by the Government in June 2021, the legislation has been considered by select committee and has now had its second reading.

What is retention money?

Retention money is an amount held back from a payment made under a construction contract. It is usually a percentage of the amount payable of each instalment. It is generally held to ensure that a contractor performs all of its obligations under the contract, and is then released either on practical completion or after the end of a defects notification period.

What are the current requirements?

The CCA currently requires any party to a construction contract (**party A**) who is withholding retention money from the other party to the construction construct (**party B**), to hold that retention money on trust for the benefit of party B. The retention money may be held in cash, "other liquid assets that are readily converted into cash", or a financial instrument such as insurance or a payment bond.

What is changing?

There are a number of key changes being made.

Funds deemed to be held on trust

As a result of some uncertainty in the original drafting, the CCA will be amended to explicitly state that a trust is created automatically; there is no need for any explicit intention of party A to hold the money on trust.

The funds will only cease to be trust property when they are paid to party B, used to remedy defects (after notice of the intention to use the funds for that purpose has been given to party B), or party B otherwise gives up its claim to the funds.

Clarifying what is retention money

The CCA will also state that funds will be considered to be retention money whether it has actually retained, and whether any amount has been paid to party B. This will resolve issues that have come to light where, if party A becomes insolvent, a partially paid subcontractor will be in a better position than an unpaid subcontractor.

How retention money may be held

Retention money will be required to either:

- be held in a bank account, or
- be the subject of a suitable financial instrument such as insurance or a payment bond.

It will no longer be permissible to use "other liquid assets", such as accounts receivable. It will therefore no longer be possible to use the retention fund as working capital.

As the use (and availability) of financial instruments is rare, most retentions will be held in bank accounts. There specific requirements for those accounts, including that:

- the account must be used solely for the purpose of retention money, and
- party A must ensure that the bank is aware that the account is a trust account for the purposes of holding retention money.

Any interest that accrues in the account will belong to party A.

Party A may choose whether to have individual accounts for each subcontractor's retention money or to have one account which holds all subcontractors' funds. If funds are mingled, then party A must ensure that it has accounting records in the form of separate ledgers, identifying each party B for whom money is held, and the construction contract to which it relates.

Regular reports on retention money

Party A will be required to give specified information to party B at the time that retention money is held (or as soon as practicable) and then at least every three months thereafter. This information must include:

- the most recent amount withheld, the relevant construction contract, and the date of the retention
- the total amount of retention money held by party A for party B
- if held in a bank account, the name of the bank and branch, the name of the account, the name of party B's ledger (if the account has separate ledgers), and the total balance held for party B, and
- if using a financial instrument, the name of the issuer, sufficient information to identify the instrument (such as a policy number), and the protected amount.

The effect of a receivership or liquidation

If party A is placed into either receivership or liquidation, the receiver or liquidator will hold the retention money on trust, and must deal with it in the same way as party A was required to do so. Reasonable fees and costs may be met from the retention money account. The CCA will also confirm that receivers and liquidators will not be liable for any unlawful or improper action taken prior to their appointment. This solves the current position where receivers and liquidators are required to make an application to the court for directions.

Failure to comply

For the first time, the CCA will include penalty provisions for entities who do not comply with the retention money scheme. These penalties include:

- for failure to keep retention money as required, a fine of up to $200,000
- for failure to keep proper accounting and other records of retention money, a fine of up to $50,000, and
- for failure to provide regular reports on retention money, a fine of up to $50,000.

If party A is a company, each director can also be personally liable for failure to keep retention money as required, with a fine of up to $50,000 for each director.

These penalties are cumulative for each breach, rather than a single penalty for a collection of breaches. This means that a director prosecuted for failing to properly hold retention funds for ten different subcontractors could be liable for a fine up to $500,000, not $50,000.

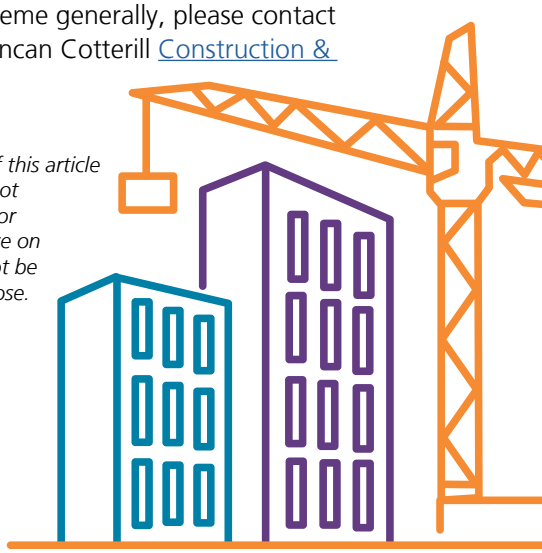
What are the next steps?

The *Construction Contracts (Retention Money) Amendment Bill* (the **Bill**) will soon have its third (and final) reading. It will come into force six months after the Bill is finally approved by Parliament, so this could be in the first half of 2023.

Businesses wanting to be prepared for the change can start by keeping retention money in a separate bank account, with proper records of who that money is held on behalf of.

Thank you to Duncan Cotterill for this content. If you have any questions about this Bill, or about the retention money scheme generally, please contact a member of the Duncan Cotterill Construction & Projects team.

Disclaimer: the content of this article is general in nature and not intended as a substitute for specific professional advice on any matter and should not be relied upon for that purpose.



PART THREE
DISPUTES

Disputes will always form part of the construction landscape. This paper would be monumental if we addressed all of the construction disputes litigated in 2022. We have selected a sample of decisions we believe reflects a cross section of issues including alternative dispute resolution, recourse to security and guarantees, contractual disputes, defects and limitations.

ARBITRATION NOT CIRCUMVENTION: COURTS NOT A BACKDOOR TO CONTRACT DISPUTE RESOLUTION

Author: Partner Julian McGrath

WCX M4-M5 Link AT Pty Ltd v Acciona Infrastructure Projects Australia Pty Ltd (No 2) [2022]

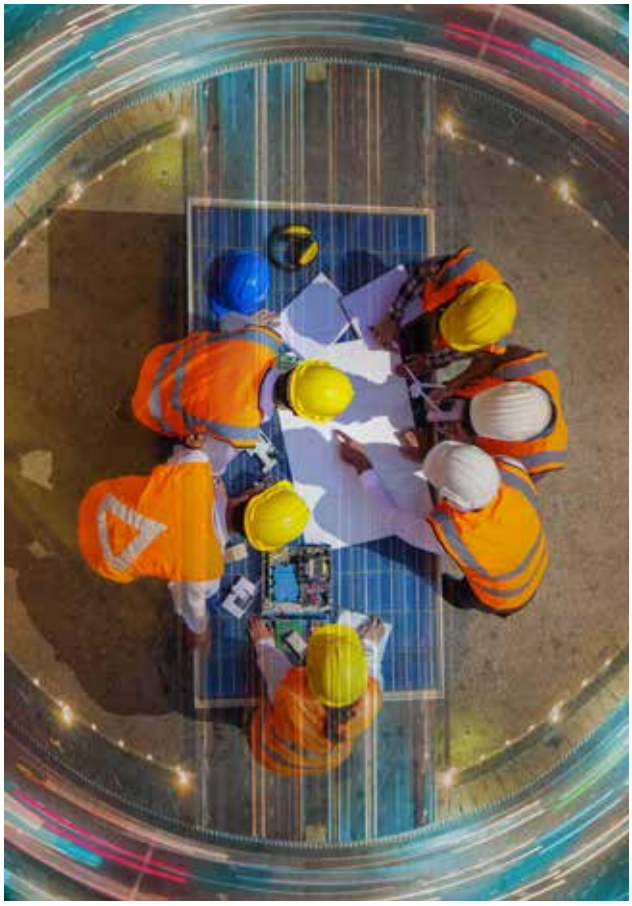
This case involved the M4-M5 Link Tunnels Project, where the Plaintiffs (**the Asset Trustee**) were a "pass through" vehicle through which Transport for NSW (**TfNSW**) would pay the Defendants (**the Contractor**) to design and construct the tunnels.

The relationship between the parties compromised two 'back-to-back' deeds. In a situation where the Contractor claimed for a variation to the contract, the Asset Trustee would make a corresponding claim against TfNSW and, if approved, the money would flow back to the Contractor. Disputes could be deemed as "linked disputes" by virtue that any determination would apply equally to both deeds. In order to resolve a dispute, the process was under a "tiered" process that required negotiation, expert determination, arbitration and the potential to appeal to the Court on points of law.

The dispute involved payment for works required to prevent incursion of contamination from a disused rubbish tip. An expert was engaged who determined that the Contractor would bear the costs. The Contractor then re-ignited the dispute by referring to two communications from the Asset Trustee, which it alleged had constituted directions to carry out the works. Therefore, the Asset Trustee would incur the costs. The Contractor attempted to refer the dispute for a fresh expert determination, which the Asset Trustee sought to contest on the basis that it would lack jurisdiction because it overlapped with the determination from the original dispute.

The Court stayed the proceedings.

This decision is important as a reminder that the courts are reluctant to interfere with or modify alternative dispute resolutions where the parties are contractually bound. Her Honour noted that an arbitration agreement is not "inoperative" merely because its function has not been exercised. If this were the case, it would provide parties with "a backdoor" to avoid their contractual obligations to an arbitration agreement. Her Honour also found that parties cannot rely on an injunction to circumvent their contractual obligations where the alternative dispute process had not been fully realised.



AWARDING DAMAGES AND PROPORTIONATE LIABILITY: LEGISLATIVE POWERS OF THE ARBITRATOR

Author: Partner Julian McGrath
Acknowledgment: Kurt Schenk

Tesseract International Pty Ltd v Pascale Construction Pty Ltd [2022] SASCA 107 (21 October 2022)

The applicant (**Tesseract**) was a company that provided engineering consultancy services to the Respondent (**Pascale**), a building company. Tesseract and Pascale entered into a sub-contract (**Contract**) by which Tesseract agreed to provide engineering consultancy services to Pascale in relation to the design and construction of a warehouse building for Bunnings Group Ltd in Windsor Gardens, South Australia.

In an arbitration commenced pursuant to a tiered dispute resolution clause, Pascale alleged that Tesseract's work was not performed to the required contractual standard and that it suffered loss and damage as a result. Pascale's claims were led on the bases of breach of contract, negligence and misleading or deceptive conduct. Tesseract denied any liability and contended in the alternative that any award of damages should be reduced for contributory negligence, and further or alternatively, that any damages payable should be reduced because of the proportionate liability of Mr Penhall, an individual engaged by Pascale to assist with its tender for the design and construction of the warehouse, who Tesseract asserted was a concurrent wrongdoer who owed and breached a duty of care to Pascale.

The Court held that proportionate liability regimes provided for in Part 3 of the Law Reform *(Contributory Negligence and Apportionment of Liability) Act 2001* (SA) and/or Part VIA of the *Competition and Consumer Act 2010* (Cth) do not apply in arbitration proceedings, unless expressly provided for by the parties in some form of agreement.

This decision is important as it confirms that proportionate liability legislation does not apply to arbitrations by force of its own terms, and unless otherwise agreed arbitrators will award damages in accordance with the common law position, meaning a respondent's liability will not be reduced to the extent others contributed. If parties want a proportionate liability regime to apply in an arbitration, they must expressly agree to this. Other matters such as joinder of possibly liable third parties also need to be considered as part of agreeing any such regime.

RECOURSE TO SECURITY AND RISK ALLOCATION IN CONTEXT

Author: Special Counsel Sarah Richards

For contractors, a call on security can have a serious impact on their cash flow and liquidity. Recent Supreme Court decisions have highlighted the difficulties building contractors may face in restraining recourse to security, particularly where the security is found to be a contractually agreed risk allocation measure.

In ***Perkins (WA) Pty Ltd v Weston [No 2]*** **[2022] WASCA 111**, the building contractor (**Perkins**) appealed orders made at first instance that the security bond to be delivered up to the financier of a development (following the principal's default under the mortgage) and the declaration that the financier was entitled to the security bond.

Perkins had previously purported to terminate the building contract with its principal and obtained a determination under the *Construction Contracts Act 2004* (WA) requiring the principal to deliver the security bond to it. In construing the building contract and tripartite agreement between Perkins, its principal and financier, the Court of Appeal held that the principal was not required to release the security upon termination of the building contract. This conclusion flowed "*from the express purpose of the security - to secure 'the due and proper performance of Perkins' obligations.*"

In ***Lanskey Constructions Pty Ltd v Westrac Pty Ltd*** **[2022] WASC 90**, the Supreme Court refused Lanskey's application for an interim injunction restraining Westrac from having recourse to three unconditional bank guarantees in circumstances where the parties were in dispute about whether Westrac was entitled to claim liquidated damages.

The Court's decision highlighted the general position that a court will not restrain payment under an unconditional obligation in a bank guarantee unless there was fraud, unconscionability in contravention of the *Australian Consumer Law* or breach of a contractual promise not to call upon the bond. Further, where the security is a risk allocation measure, a court must take account of the agreement between the parties as to who should bear the financial risk pending final determination.

DAEWOO SHIPBUILDING & MARINE ENGINEERING CO LTD V IMPEXC OPERATIONS AUSTRALIA PTY LIMITED [2022] NSWSC 1125

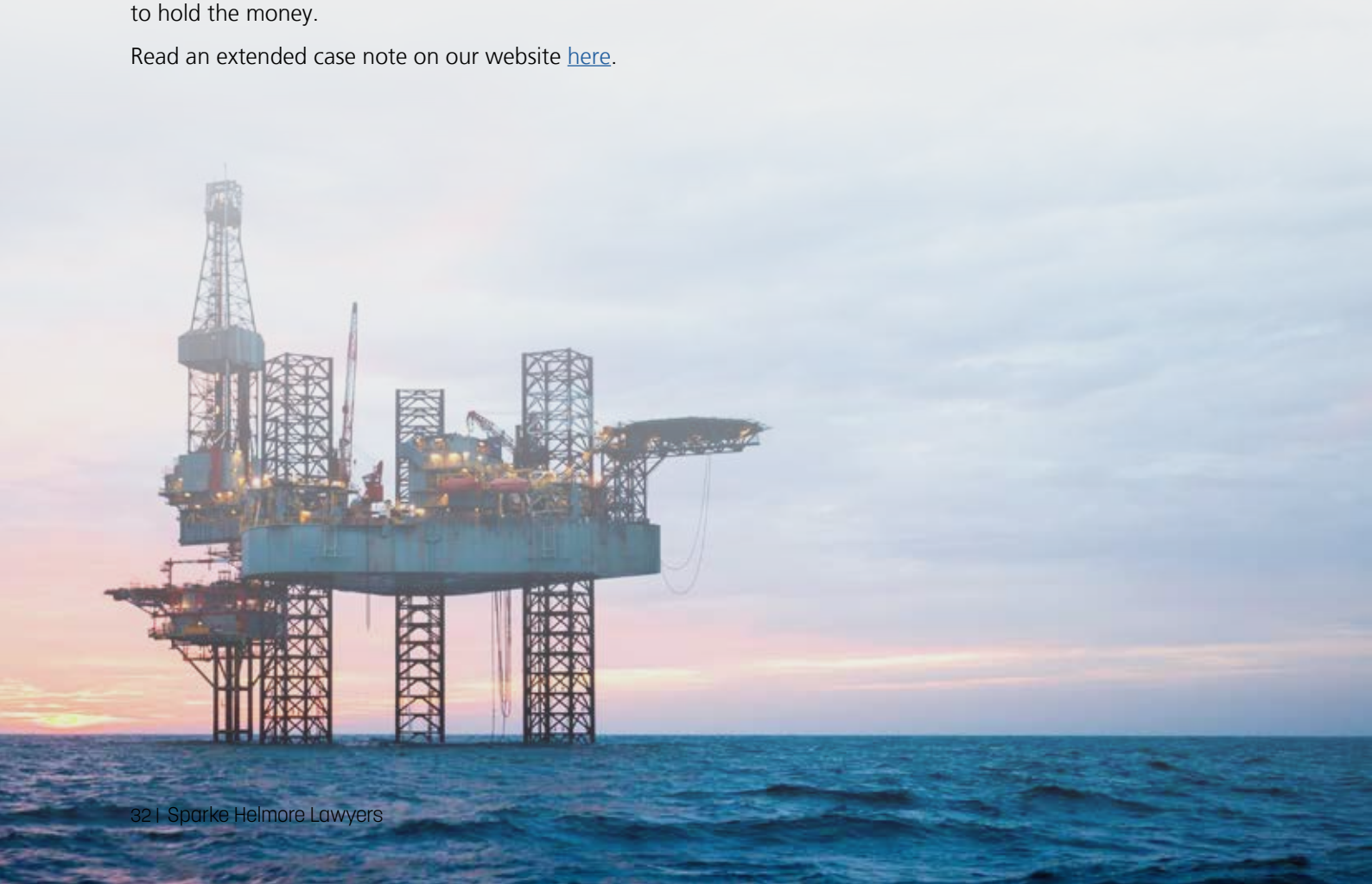
Author: Partner Julian McGrath

In ***Daewoo Shipbuilding & Marine Engineering Co Ltd v INPEX Operations Australia Pty Ltd*** **[2022] NSWSC 1125**, the Supreme Court refused Daewoo's application to restrain INPEX's call on a bank guarantee. The bank guarantee was provided by Daewoo under its contract with INPEX to construct a Floating Production Storage Offloading Facility (a gas platform) (**FPSO**) in the Ichthys Gas Field situated 220kms off the north Western Australian coast in the Timor Sea.

INPEX commenced an international arbitration in Singapore in relation to the parties' dispute about alleged defects and delays in delivery of the FPSO. The arbitration was expected to go on for some years before reaching a final determination and INPEX had given notice of intention to call on the bank guarantee. This prompted Daewoo to seek injunctive relief in the Commercial List of the Supreme Court of New South Wales, restraining that call.

In dismissing the application for injunctive relief, the Supreme Court found that the bank guarantee was a contractual "risk allocation device" and provided a "pay now, argue later" regime. Accordingly, despite Daewoo's financial difficulties and the potential defaults that would result from a call on the bank guarantee, Daewoo was bound by the parties' contractual bargain that pending the resolution of the arbitration INPEX gets to hold the money.

Read an extended case note on our website here.



HASTIE GROUP LIMITED (IN LIQ) V MULTIPLEX CONSTRUCTIONS PTY LTD (FORMERLY BROOKFIELD MULTIPLEX CONSTRUCTIONS PTY LTD) (NO 3) [2022] FCA 1280

Author: Partner Kiley Hodges

Background

The Hastie Group of companies (**Hastie**) provided mechanical, electrical and plumbing services in a number of countries. Voluntary administrators were appointed in 2012. Five years later the liquidator[20] commenced proceedings in the Federal Court against some of Australia's largest construction companies (**Head Contractors**), seeking to recover about AU$120 million.

Proceedings

The liquidator claimed that the Head Contractors failed to pay Hastie the cumulative sum of $60 million in "receivables" owing as at 28 May 2012 (**Receivables Case**).

The liquidator also claimed that the Head Contractors impermissibly drew on performance guarantees (also referred to as "bank guarantees" or "performance bonds") purchased by Hastie and provided to each of the Head Contractors as an alternative to the retention of monies from progress payments under their respective subcontracts (**Bank Guarantee Case**).

The liquidator asserted that the monies owed in receivables and the monies drawn down by the Head Contractors on the bank guarantees were each property of the Hastie entity that performed the work under the subcontract and purchased and provided the bank guarantee. The liquidator sought to recover those monies for the benefit of Hastie's creditors.

The liquidator also argued that:

- the Head Contractors were prohibited from bringing proceedings against Hastie to secure orders transferring proprietorship of the amount drawn down on the bank guarantees to the Head Contractor
- the Head Contractors were required to submit proofs of debt to the liquidator
- the liquidator was required to immediately taken into custody the amount drawn down by each Head Contractor under the bank guarantee
- the *pari passu* principle and priority payments regime applied, and therefore each Head Contractor was prohibited from using the proceeds of the bank guarantee to satisfy their claims against Hastie. Further priority creditors such as employees should be paid first, and
- any disposition of Hastie's property made after the liquidator's appointment was voided, including each Head Contractor's draw down of the bank guarantees.

[20] The nature and identity of the Applicants is greatly simplified in this summary by referring only to the liquidator, which we do for ease of reference.

The Head Contractors argued that:

- no valid receivables were ever owing under the relevant subcontracts
- if a receivable was owing, they were entitled to set-off that amount (pursuant to s 553C of the *Corporations Act*) against monies owed by Hastie under the subcontracts by reason of the loss and damage suffered by Hastie being unable to complete the works
- the liquidator did not have any proprietary rights in the proceeds of the respective guarantees. Accordingly, Chapter 5 of the *Corporations Act* was not applicable
- the limitation period had expired, and
- the value of their claims against Hastie were greater than the amount of the unpaid receivables and the amount of the guarantee proceeds held by them.

Key findings

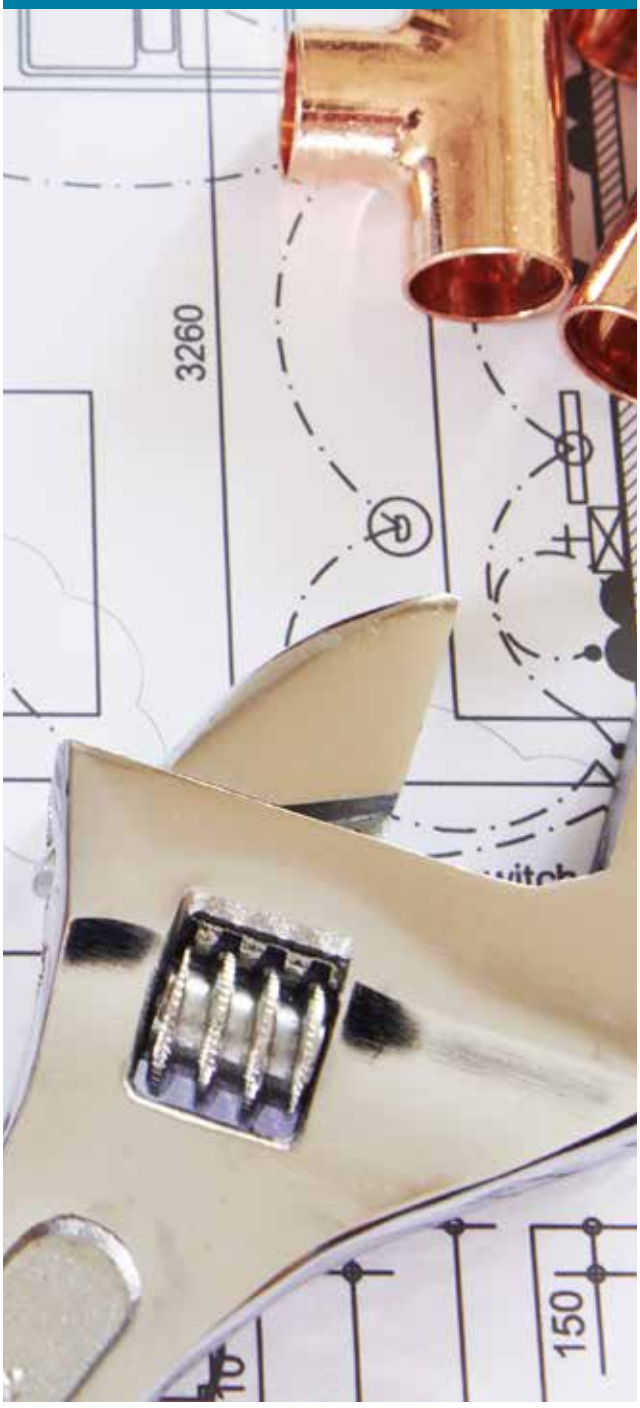
Justice Middleton delivered a 196-page judgment on 2 November 2022 finding in favour of the Head Contractors. The key findings were as follows:

- The Head Contractors were each entitled to the benefit of the application of set-off pursuant to the principles set out in s 553C in the winding up of Hastie. Further, this entitlement was not dependent on any precondition of lodging a proof of debt in the winding up, or on the determination of the liquidator as to the application of s 553C set-off in respect of the relevant claims.
- By virtue of the various contractual instruments in relation to the bank guarantees, the Head Contractors were conferred proprietary interests in the physical bank guarantee instruments, and also the proceeds of the bank guarantees drawn down (once those proceeds were received by the Head Contractors).
- Hastie did not possess proprietary interests in the bank guarantees. Any proprietary interests or rights of action that Hastie possessed as "choses in action" or "things in action" were of no consequence or utility for the purposes of the claims against the Head Contractors.
- The Hastie entities were not trustees of property for creditors, and nor was the liquidator.

Implications

We do not expect this to be the end of this complex, hard fought and long running litigation. An appeal is expected.

Meanwhile, this decision reinforces the role of bank guarantees in commercial transactions. It should provide comfort to contracting parties that bank guarantees remain enforceable and cannot be clawed back by liquidators.



DAMAGES AWARDED AGAINST BUILDER FOR REPUDIATION OF FIXED PRICE CONTRACT

Author: Partner Kiley Hodges

On 1 September 2022, in *Addinos Pty Ltd v OJ Pippin Homes Pty Ltd* [2022] QDC 205, Justice Rinaudo of the District Court of Queensland issued a timely decision confirming that termination of a fixed price contract due to increased costs amounted to repudiation for which damages were payable.

Background

A property developer (Addinos Pty Ltd in its capacity as trustee of the Addinos Discretionary Trust, the **Developer**) engaged a construction company (OJ Pippin Homes Pty Ltd, the **Builder**) to carry out residential works including demolition, excavation and construction of townhouses (**Project**).

After completing the demolition works, the Builder wrote to the Developer terminating the contract, citing significantly increased construction costs due to delays.

The Builder wrote an email[21] stating:

> *"I regret to inform you that we will be terminating your contract for the construction... Please see attached letter…*
>
> *Due to unforeseen time taken to date we are no longer able to build this project within our construction schedule or for the costs originally quoted…"*

Attached to the email was a letter stating:

> *"We write to advise you that OJ Pippin Homes Pty Ltd will be terminating the build contract for the dwellings to be constructed at the above address. The construction cost* [sic] *have increased significantly since the project was priced, almost 12 months ago. The building approval process has been extremely lengthy and we no longer have the capacity to undertake the works within our production schedule…".*

However, the Builder sent a text message to the Developer the following day[22], stating:

> *"… I just can't build this project sorry mate. We just lost two of our most experienced supervisors and Kelly [Simpson] in the office due to the complexities of building these small projects. Our costs for these are going through the roof with trades charging big premiums on rates due to access issues etc. this is then causing delays in contract times and hence liquidated damages. We have decided as a business to go back to just houses at this state* [sic]. *I really am sorry for the inconvenience caused."*

The Developer responded[23] stating:

> *"… Both your letter, and your abandonment of the contract and works, each amount to a wrongful repudiation and breach of the contract. To avoid the cost and expense to both of us associated with following the formal termination procedure under the contract, we propose… that we agree that the contract was at an end as at 17 March 2016 as a result of your letter… any and all rights we have under the contract and otherwise (including but not limited to any rights to damages) are reserved…".*

The contract was for a fixed lump sum and contained no provisions allowing for termination in these circumstances. The Developer engaged a new builder to complete the Project and sought damages for increased construction costs, additional interest and charges on two loans, and additional costs associated with ownership of the land for the extended duration of time and with extending building permits.

[21] Sent 17 March 2016
[22] Sent 18 March 2016
[23] By letter dated 23 June 2016

The Builder disputed the claim on the following grounds:

- it had actually contracted with "*Addinos Pty Ltd ABN 159 849 584*", rather than the Plaintiff company,
- the Developer had not obtained the required approvals in a timely manner, which effectively repudiated the contract, and
- in the alternative, it was entitled to an extension of time (**EOT**) for practical completion due to the Developer's delays.

Decision

The Court was satisfied that that the correct Plaintiff was "*Addinos Pty Ltd ACN 166 300 349, in its capacity as trustee of the Addinos Discretionary Trust ABN 159 849 584*". The Court found that this did not affect the legality of the contract as "*a trustee* [does not have] *an additional or qualified legal personality.*"[24]

With respect to the EOT claimed, his Honour found that the Developer had not complied with the contractual requirement for written notice of the delay, which was a condition precedent to the Builder's entitlement. The Developer was therefore not entitled to an EOT.[25]

As to repudiation, the Developer argued that the text message showed the real reason for contract termination was the Builder's internal issues and not any delay on the Developer's part. His Honour agreed. His Honour found no evidence that the Developer refused to arrange the approvals, or the Developer acted in a way that would show they ceased or suspended the process of obtaining approvals before the Builder repudiated the contract.

The Court held that the Builder had no lawful basis to terminate the contract and awarded damages to the Developer.

Implications

This decision is important in the context of current pressures on the construction industry including rising costs and increasing pressure on liquidity. In this environment it is particularly important to identify condition precedents when contracts are entered into, carefully managed contracts to ensure compliance, and draft all correspondence precisely to ensure adverse consequences are avoided.

[24] *Yara Australia Pty Ltd v Oswal [No 2]* [2013] WASCA 265 at [259].
[25] An EOT would only have impacted the damages payable. It did not provide a complete defence to the claim.

COMPETING CONTRACTS

Author: Partner Julian McGrath

Forte Sydney Construction Pty Limited v N Moit & Sons (NSW) Pty Limited [2022] NSWCA 186

This case was a contractual dispute between Forte (the head contractor) and Moit (its excavation subcontractor) over the basis of Moit's retainer in respect of excavation work undertaken on a site at Ryde over the period May to November 2018.

There were two competing contracts viz: (1) a formal written contract submitted by Forte on 21 May 2018 and; (2) a document headed "final tender revision" later submitted by Moit on the same day. Neither document had been signed and significantly, different monetary consequences attached according to whose "contract" was determined to govern Moit's involvement.

The primary District Court Judge held that as Moit had not accepted Forte's version of the subcontract then necessarily, Moit's "tender revision" must be held to govern the parties in circumstances where Moit had commenced the subcontract works on 28 May 2018.

The NSW Court of Appeal allowed Forte's appeal on the basis that as a matter of contract theory, Moit's tender submission had been rejected by Forte's subsequent provision of the amended subcontract that had terms inconsistent with Moit's tender submission. It was further held that whilst Forte's subcontract stipulated the means by which that offer should be accepted and the time for acceptance (which had not been complied with by Moit), it did not follow that that the offer had lapsed.

Finally, the subsequent acceptance by Forte of a variation by Moit (made in terms of the tender revision) did not constitute an admission.

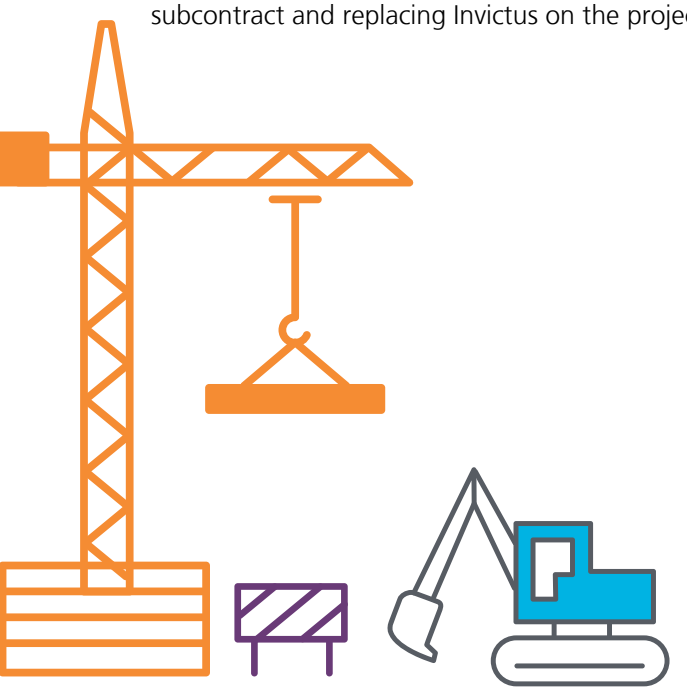
FAILURE TO IMMEDIATELY COMPLY WITH CONTRACTUAL DIRECTION FALLS SHORT OF REPUDIATORY CONDUCT

Author: Partner Julian McGrath

Invictus Development Group Pty Limited v Versatile Fitout Pty Limited [2002] NSWDC 477

This decision of Judge Abadee SC of the District Court of New South Wales involved a dispute under a formal (lump sum) subcontract between Versatile and its subcontractor Invictus, involving construction work being undertaken at Sydney Airport at Mascot over 2017 and early 2018. The works included the construction and erection of a set of stairs that were subject to a defect on the basis that the stairs had a bowing appearance and required correction and rectification.

This culminated in Versatile issuing Invictus with a formal direction under its subcontract that rectification works be undertaken to correct the problem. The principal of Invictus was temporarily unavailable due to a trip and there was disputed factual evidence over the various attempts to reach him during this period. This resulted in Versatile unilaterally terminating the subcontract and replacing Invictus on the project.



Invictus sued Versatile claiming that that unilateral termination constituted a repudiation of the subcontract, entitling it (Invictus) to sue for consequential damages as well as to sue in debt to recover the amounts of its outstanding invoices. In turn, Versatile asserted that Invictus' failure to comply with its direction under the subcontract was a repudiatory breach, entitling it to terminate and avoid liability for any of the outstanding invoices.

After closely analysing the conduct of the parties and the consequential delays, Abadee DCJ quoted the High Court in *Shevill v Builders Licensing Board [1982] HCA 47* that repudiation was a "*a serious matter and is not lightly to be found or inferred*". The Judge found that the failure to immediately comply with the contractual direction fell a long way short of repudiatory conduct, and the term in question was only an intermediate one. The termination of the subcontract was therefore wrongful and illegal. It followed that Invictus was entitled to succeed on its claim in debt for its unpaid invoices. However, Invictus could not establish its claimed entitlement to substantial damages that were said to follow from its wrongful repudiation of the contract.

The case (albeit of an intermediate Court) stands as a cautionary tale in the difficulties in establishing repudiatory breach warranting termination and the need.

ASSESSING EXTENSION OF TIME CLAIMS

Authors: Partner Patrick McGrath & Special Counsel Claire Gomo

V601 v Probuild[26]

V601 Developments (**V601**) carried out a mixed-use development at a large site in Abbotsford, Melbourne. It engaged Probuild to prepare the site under an early works contract, and then to complete design and construction under a head contract (**Contract**).

The Contract required V601 to ensure that the Superintendent acted as an independent certifier when assessing extension of time (**EOT**) claims.

Probuild was delayed in completing the project. Its EOT claim during the project had largely been rejected by the Superintendent. V601 commenced the proceeding claiming liquidated damages for late completion. Probuild counterclaimed for EOTs, delay damages, acceleration costs, an early completion bonus and payment for a variation.

The Court held that if a superintendent fails to perform its assessment, determination and certification functions in accordance with the degree of independence required by a ontract, those assessments, determinations and certifications will be void.

In considering Probuild's claims for accelerating costs, the Court found that Probuild was entitled to recover accelerating costs incurred to overcome and minimise delay.

[26] [2021] VSC 849.

COURTS PUT A PLUG IN NEIGHBOURS NUISANCE DRAINAGE SOLUTION

Author: Partner Kiley Hodges

Graham & Anor v Alic & Anor [2022] QDC 106

In April 2022 the District Court of Queensland at Brisbane granted an injunction to owners of a property (**Graham**) after their uphill neighbours (**the Alics**) carried out works which altered the natural flow of water onto their property.

The works included extending a retaining wall (that did not have appropriate or approved drainage) and cutting a close steep slope into the land. The Court found the works were not structurally sound, increased the flow of water onto Graham's land, and were not a natural and reasonable use of the land.

The injunction provided for the removal and reconstruction of the retaining wall, to be designed by an engineer selected by "*the head of the relevant professional organisation*". The wall was required to have "*adequate and reasonable drainage necessary to abate the nuisance*" caused by the increased flow of water.

This decision highlights the necessity for construction professionals to consider the impact of their designs and works on the flow of water onto neighbouring properties.

AND THE WINNER IS? NOT THE BUILDER

Author: Partner Julian McGrath

Krolczyk v Winner t/a Winner Building Services [2022] NSWCA 196

The Krolczyks (Appellants) were the aunt and uncle of the respondent, Mr Winner. The Krolczyks were the registered proprietors of a property at Windsor in respect of which they wished to undertake certain renovation works. Mr Winner was a licensed builder and was also qualified as a quantity surveyor.

Mr Winner had assisted with the project by:

- doing some of the work himself
- assisting in the progress of the DA, and
- by enlisting other tradespeople to work on the project. By 2016 defects were defected in the performance of the work.

The Krolczyks claimed that Mr Winner had assumed the role as "the Builder" for the project such that he must be deemed to have assumed warranties and guarantees under s. 18B of the *Home Building Act 1989* (NSW). Mr Winner claimed that he had done the work as a favour to his aunt, and that the Krolczyks were themselves licensed builders.

The trial judge, Judge Olsson SC found that Mr Winner had not assumed the role of "the Builder" or the supervisor of the project. The primary judge found in favour of a narrower agreement whereby the parties would simply assist one another. Accordingly, Mr Winner had no liability other than in respect of the work he was directly involved in. The Trial Judge found some component liability on Mr Winner's behalf but had awarded indemnity costs against the Krolczyks on the basis that Mr Winner had offered to pay this sum by means of Calderbank offer.

The NSW Court of Appeal upheld the finding that Mr Winner could not characterised as "the Builder" or the supervisor for the purposes of the *Home Building Act* and therefore Mr Winner's liability was limited to that defective work he had directly participated in (the wall framing work). There was no appealable error in the primary judge's use and interpretation of the evidence.

DEFECT LIABILITY EXTENDED TO DEVELOPER WHEN BUILDER GOES INTO LIQUIDATION

Author: Partner Julian McGrath

Rialto Sports Pty Limited v Cancer Care Associates Pty Limited [2022] NSWCA 146

Rialto was the owner and developer of a four-story commercial strata building. The building was completed in October 2014, where prior to completion, Rialto had entered into an "off the plan" contract of sale for some of the units. The builders that Rialto had engaged used a façade cladding of material, which has since been proscribed. By January 2014, that builder had gone into liquidation. The claim was brought by four separate unit owners against Rialto for the use of the cladding and the defective waterproofing on the façade.

Despite Rialto's assertion that it was under no contractual obligation to construct the building itself, the Court rejected its argument that it had discharged its obligation under the sales contract when engaging the builders to carry out the work. Rialto was still under an obligation to construct the building in a workmanlike manner owed to the purchasers. The Court also held that the workmanship obligation survived completion of the sales contract, by reference to the various special conditions that were intended to have application after completion.

Developers need to be aware of their obligations to construct in a workmanlike manner or in compliance with the *National Construction Code* when executing sale and purchase contracts. Liability can still be extended to a developer where the builder it has engaged is either unwilling or unable to meet the claim brought for rectification (for example, entered into liquidation).

DESIGN & BUILDING PRACTITIONERS ACT 2021 (NSW) UPDATE

Author: Partner Dino Liistro
Acknowledgment: Kurt Schenk

The *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) has been in force for a little over two years now and in 2022, we have seen a number of important decisions impacting on its interpretation and in particular:

- the meaning of "construction work", and
- those considered to have a duty in respect of the carrying out of "construction work".

The following are the most significant decisions from 2022.

Goodwin Street Developments atf Jesmond Unit Trust v DSD Builders (in liq) [2022] NSWSC 624

In this decision of the Supreme Court of New South Wales the Court held that:

- the statutory duty of care owed by builders and building professionals under the DBP Act applies broadly and extends beyond residential building work to work relating to a "building" as defined in the *Environmental Planning and Assessment Act 1979* (**EPA Act**). Here, the extension meant that the duty applied to the construction of a boarding house but, on the reasoning, the duty would extend to other commercial buildings, and
- a project manager of a building company can personally owe a duty of care to homeowners in respect of building work under their supervision and therefore be held liable in respect of defects in that building work.

The Plaintiff, Goodwin Street Developments Pty Ltd (**Goodwin**), is and was the owner of land in Jesmond, New South Wales. Goodwin entered into a building contract with the First Defendant, DSD Builders Pty Ltd (**DSD**), to construct three residential boarding houses, intended for university student accommodation. DSD, now in liquation, was a company whose sole director, Ms Angela Sendjirdjian, was the fiancée (and later wife) of the Second Defendant, Mr Daniel Roberts.

Goodwin alleged (and it was ultimately found) that Mr Roberts was the representative of DSD who negotiated the building contract with Goodwin, that Mr Roberts administered the building contract on behalf of DSD and that Mr Goodwin controlled the carrying out of the construction work on the site on behalf of DSD.

Disputes arose between Goodwin and DSD relating to defective building works and the progress of the works (among other matters). Goodwin claimed that Mr Roberts carried out "construction work" on the site and acted in breach of his statutory duty of care under s 37 of that DBP Act. It claimed some $300,000 from Mr Roberts for the cost to rectify the building defects.

The Court held that Mr Roberts carried out "construction work" for the purpose of s 36 of the DBP Act, because the DBP Act incorporates the definition of "building" from the EPA Act, and that definition in turn (relevantly) incorporates the ordinary meaning of a building (and the exceptions to that definition did not apply).

The Court further held that Mr Roberts had a duty of care under s 37 of that DBP Act because he was appointed as a project manager and because, on the evidence, it was clear that he also supervised DSD's construction. He was therefore engaging in "construction work" for the purposes of the DBP Act, and so owed the duty of care under s 37.

Mr Roberts was found to have breached his duty of care and was therefore found liable to pay Goodwin the cost of rectify the defects.

Mr Roberts has filed an appeal that has yet to be determined.

Owners of Strata Plan No 84674 v Pafburn Pty Ltd [2022] NSWSC 659 and *Owners of Strata Plan No 84674 v Pafburn Pty Ltd* (No 2) [2022] NSWSC 1002

This was an interlocutory decision of the Supreme Court of New South Wales that considered what was meant by having "substantive control" within the meaning of the term "construction work" in the DBP Act. The Court also considered whether a duty under s 37 of the DBP Act could be owed by an owner of a property, given the duty was owed to the owner of a property, and the application of the limitation period in respect of new defects identified more than 10 years after the construction work.

The Plaintiff was, and is, the Owners Corporation in respect of a strata property in North Sydney (**the Owners**). The First Defendant, Pafburn Pty Limited (**Pafburn**), was the builder. The Second Defendant, Madarina Pty Limited (**Madarina**), was the developer and was, until registration of the strata plan, the owner of the land upon which the development was undertaken.

The Owners alleged that Pafburn and Madarina acted in breach of the statutory duty of care prescribed by s 37 of the DBP Act because, as to Pafburn, it constructed the building defectively, and as to Madarina, it engaged in "construction work" for the purposes of s 37 of the DBP Act because it "substantively controlled" the building work carried out by Pafburn.

The Court held that to establish that a person has "substantive control" over the carrying out of building work, it will be sufficient to show that the person was in a position to control how the work was carried out, whether it was actually doing so at that particular moment in time. That is a question of fact that will need to be decided in each case. The fact that a developer owned all the shares in a builder, and had common directors, *might* lead to an inference of such an ability to control the work. Where, as here, the position is the other way around, namely that the builder owns all the shares in the developer, that inference may be less easily available. This issue did not need to be finally determined on the interlocutory application.

The Court also held that a duty under s 37 of the DBP Act could be owed by an owner of a property (such as a developer) provided it could be found to have undertaken "construction work". The owner would not owe a duty to itself, but to "each owner" other than itself referred to in s 37 of the DBP Act. Subsequent owners, such as the Owners in the present case, could therefore be owed a duty of care by a previous owner that undertook "construction work".

In a second interlocutory decision in this matter, the Court considered whether proposed amended pleadings were sufficient to make good a case against Madarina assuming the pleaded facts could be proved. The Court found that they were, primarily because where all that is needed to show that a person is able to control how work is carried out is that they are found to have exercised "substantive control" over building work.

Of note also was the further consideration given to the statutory limitation periods in respect of the identification of "new defects" after the expiration of the 10 year limitation period in the DBP Act. The Court confirmed that pleading "new defects" not previously pleaded did not introduce new causes of action, as there was a single cause of action (being the breach of s 37 of the DBP Act). Where "new defects" are identified even after the expiration of 10 years from the construction works, they can form part of an existing claim under s 37 of the DBP Act.

Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2) [2022] NSWSC 1368

The Court's interlocutory decision, relevantly, concerned whether a:

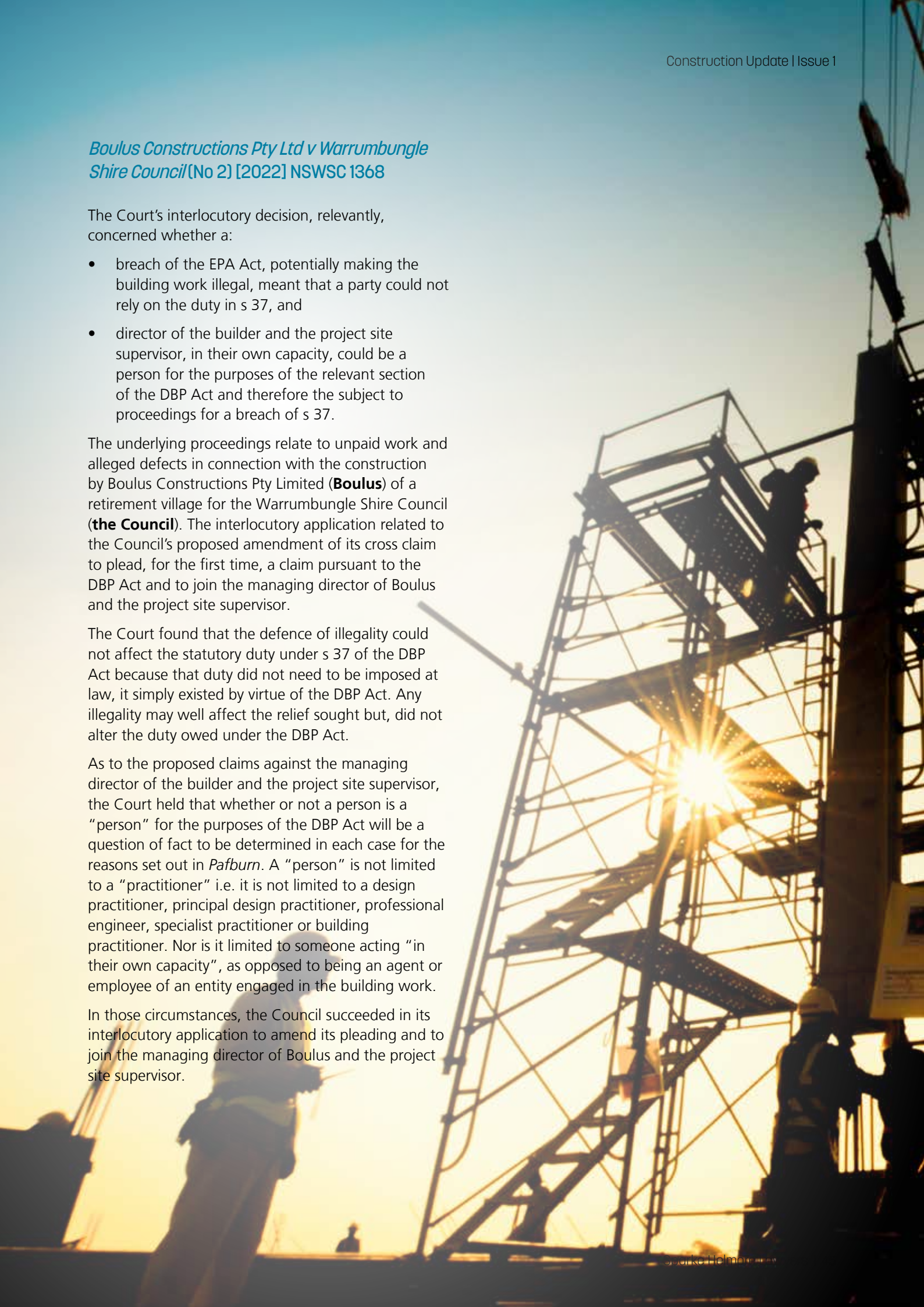
- breach of the EPA Act, potentially making the building work illegal, meant that a party could not rely on the duty in s 37, and
- director of the builder and the project site supervisor, in their own capacity, could be a person for the purposes of the relevant section of the DBP Act and therefore the subject to proceedings for a breach of s 37.

The underlying proceedings relate to unpaid work and alleged defects in connection with the construction by Boulus Constructions Pty Limited (**Boulus**) of a retirement village for the Warrumbungle Shire Council (**the Council**). The interlocutory application related to the Council's proposed amendment of its cross claim to plead, for the first time, a claim pursuant to the DBP Act and to join the managing director of Boulus and the project site supervisor.

The Court found that the defence of illegality could not affect the statutory duty under s 37 of the DBP Act because that duty did not need to be imposed at law, it simply existed by virtue of the DBP Act. Any illegality may well affect the relief sought but, did not alter the duty owed under the DBP Act.

As to the proposed claims against the managing director of the builder and the project site supervisor, the Court held that whether or not a person is a "person" for the purposes of the DBP Act will be a question of fact to be determined in each case for the reasons set out in *Pafburn*. A "person" is not limited to a "practitioner" i.e. it is not limited to a design practitioner, principal design practitioner, professional engineer, specialist practitioner or building practitioner. Nor is it limited to someone acting "in their own capacity", as opposed to being an agent or employee of an entity engaged in the building work.

In those circumstances, the Council succeeded in its interlocutory application to amend its pleading and to join the managing director of Boulus and the project site supervisor.



FAILURE TO COMMUNICATE DEEMED A FACTOR IN RECOVERING COSTS

Authors: Partner Patrick McGrath
& Special Counsel Claire Gomo

Hacer Group Pty Ltd v Euro Façade Tech Export SDN BHD[27]

Hacer Group Pty Ltd (as **Builder**) commenced proceedings against Euro Façade Tech Export SDN (the **Subcontractor**). The Subcontractor had been engaged to design, engineer, manufacture and supply a façade system for a residential apartment complex.

The subcontract included terms along the usual lines allowing the Builder to notify the Subcontractor of defects, providing the Subcontractor with an opportunity to rectify them. If the Subcontractor failed to do so, the Builder was entitled to engage others to execute the rectification works and to recover its costs.

The Subcontractor pleaded that it never received from the Builder a notice of the defect or a direction to rectify the defect pursuant to the contract, and was therefore denied the opportunity to remedy it. The Subcontractor therefore argued that the Builder was only entitled to recover the cost that the Subcontractor would have incurred to remedy the alleged defect had they been provided the opportunity to do so.

Justice Stynes considered the decision of *Turner Corporation Ltd v Austotel Pty Ltd* (1994) 13 BCL 378. In this case, no entitlement to recover costs for third-party rectification work was found to arise because of procedural missteps. However, her Honour distinguished the *Turner* judgment, holding that, as the subcontract included a broad indemnity and did not exclude liability for damages, the Builder retained "*its common law right to damages even where it has not complied with the contractual provisions governing the notification and rectification of defects*".

Justice Stynes then considered whether the Builder was confined to its claim for liquidated damages for delay, or whether it could alternatively claim common law delay damages.

Her Honour considered that two factors "*weigh heavily in favour of a finding that a liquidated damage clause provides an exhaustive remedy for delay*":

- the contract sets out a "positive sum" of liquidated damages, and
- the liquidated damages clause is mandatory.

Both factors were established in the subcontract. Therefore, Justice Stynes held that the Builder could not claim common law damages for delay and was restricted to the liquidated damages claim.

[27] https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2022/105.html

COVID-RELATED DELAYS ALLOWING COUNTY COURT TO HEAR DOMESTIC BUILDING DISPUTES

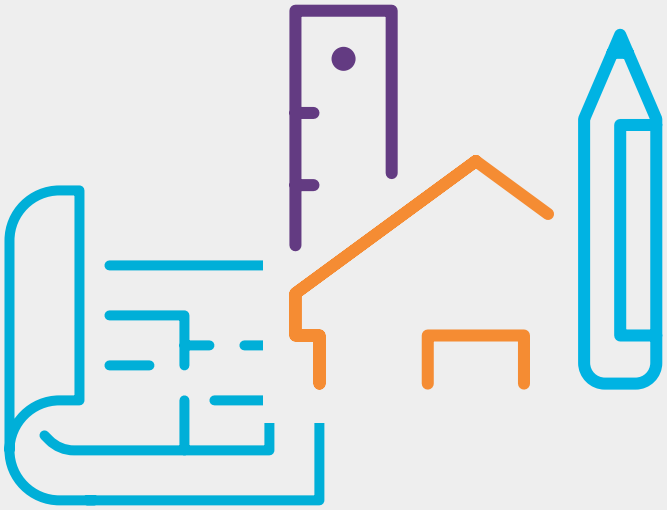
Authors: Partner Patrick McGrath & Special Counsel Claire Gomo

Uber Builders and Developers Pty Ltd v MIFA Pty Ltd [28]

Traditionally domestic building disputes have been litigated in VCAT. Indeed s 57 of the *Domestic Building Contracts Act* 1995 (Vic) provides that a court must stay a proceeding if it arises wholly or predominantly from a domestic building dispute; the dispute *could be heard in VCAT*; and the court has not heard any oral evidence concerning the dispute itself;

However, the delays in cases being dealt with by VCAT became so pronounced during the COVID-19 lockdowns that the County Court held, in *Impresa Construction v Oxford Building & Ors [2021]* VCC 1146, that the question whether "the action could be heard by VCAT" required a consideration of VCAT's ability to deal with a dispute in a timely manner given the availability of resources. The Court observed that the "*public policy rationale behind s57 of the Act appears to be frustrated. Allowing mandatory stay of proceedings to be heard in VCAT where there is a shortage of resources to meet the backlog of matters … all subvert the purpose of both the Act and the CPA to enable timely and cost-effective dispute resolution.*"

In Uber Builders, the case concerned the development of 11 residential apartments, a basement carpark and commercial space in Brunswick. A dispute arose and the builder issued proceedings in the County Court. A stay application was made on the basis that s 57 required the dispute to be dealt with by VCAT. The parties agreed, for the purposes of the case, that it involved a domestic building dispute (notwithstanding commercial aspects of the development) however the County Court applied *Impresa* and held that the domestic building dispute was able to be commenced in the County Court while the conditions in VCAT persisted, and that the provision "could be heard by VCAT" in s 57 was not applicable.



[28] [2021] VCC 1677.

WHO PAYS TO REPLACE COMBUSTIBLE CLADDING?

Author: Lawyer Chris McGill

Strata Plan 92450 v JKN Para 1 Pty Ltd & Anor [2022] NSWSC 958

This New South Wales Supreme Court decision considered the ongoing question of combustible cladding in Australia.

In particular, the Court considered whether the allegedly combustible aluminium composite cladding (**Cladding**) installed on a 28-storey strata scheme property, which comprised 133 lots (**Building**), was in breach of the statutory warranties contained in s 18 of the *Home Building Act 1989* (NSW) (**Act**) and did not comply with the Building Code of Australia (**BCA**).

The Owners of Strata Plan No 92450 (**Owners Corporation**) alleged that the developer JKN Para 1 Pty Ltd (**JKN**) and the builder Toplace Pty Ltd (**Toplace**) had breached the statutory warranty under the Act and consequently sought damages for the removal and replacement costs of the Cladding.

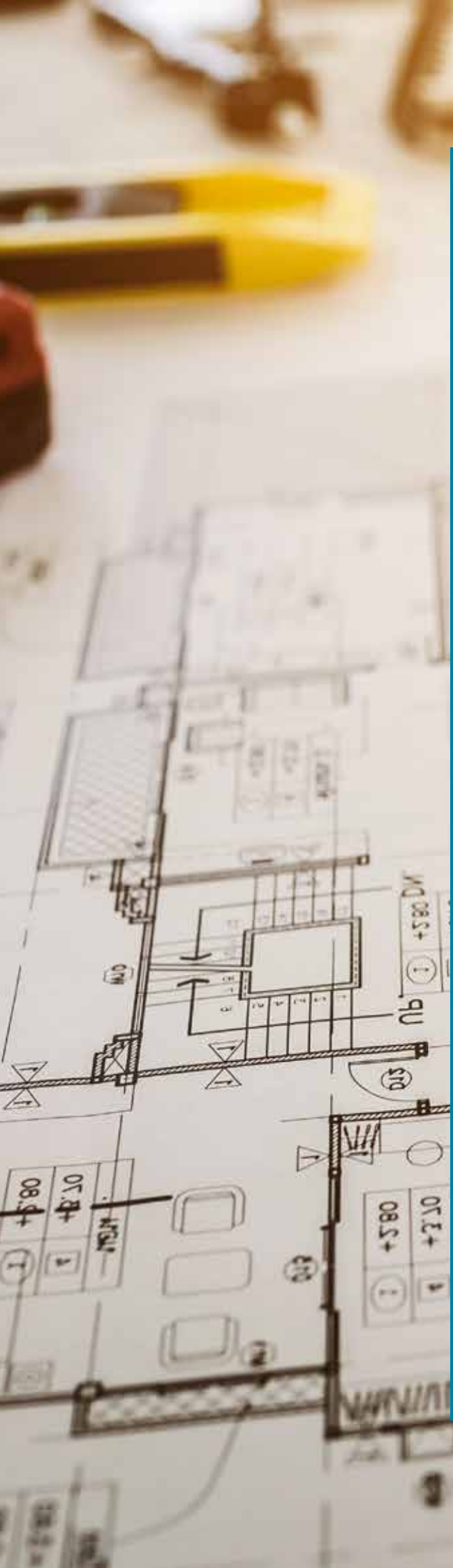
JKN and Toplace contended, amongst other things, that the use of the Cladding did not create 'undue risk of fire spread' in light of the other fire protection systems fitted in the Building. Additionally, they argued that the Cladding could have been compliant with the BCA under the 'Alternative Solution' provisions.

The Court found against the Owners Corporation finding, in summary, that the Owners Corporation had failed to sufficiently demonstrate that the installation of the Cladding resulted in a dwelling that is not reasonably fit for occupation as a dwelling.

This case highlights important considerations for Owners Corporations, developers, builders, and their insurers concerning the ever-present issue around the world of "who pays to replace the combustible cladding?".

In this case, the installation of combustible cladding alone was not reason enough to justify the Owners Corporation recovering the costs of removing and replacing the Cladding. It highlights that, at a minimum, good quality evidence is required to establish that the installation of combustible cladding was in breach of the statutory warranties or in establishing non-compliance with the BCA.

Specifically, anyone seeking to recover costs for removing and replacing combustible cladding should carefully consider what evidence and testing was available at the time the cladding was installed, and whether it can be established that there was an alternative solution.



LOOK, BUT DON'T TOUCH (COPYRIGHT PLANS OR DRAWINGS)

Author: Partner Kiley Hodges

Look Design and Development Pty Ltd v Edge Developments Pty Ltd & Flaton [2022] QDC 116

The Plaintiff, Look Design and Development Pty Ltd t/as Coast Life Homes is a project builder. It alleged its plans and drawings were used by the First Defendant, Edge Developments Pty Ltd (**Edge**), to construct a home for the Second Defendants (Fiona and Philip Flaton, the property owners, the **Flatons**), and sought damages for breach of copyright.

In May 2022 the District Court of Queensland at Maroochydore found that the plans used by Edge to design the home constructed for the Flatons were prepared in infringement of the Plaintiff's copyright and ordered the Flatons pay nominal damages of $500 to the Plaintiff. (The Plaintiff was paid $30,000 by Edge, with whom it had settled prior to hearing).

This case involved detailed analysis of the circumstances in which the design was prepared, which included the Flatons showing Edge other designs they liked. The evidence included overlaying one design over the other, to show the similarities. Care should be taken by designers, particularly when project homes are often very similar in nature.

ADVISING ON FLUCTUATING BUILDING COSTS: AN ARCHITECT'S DUTY?

Author: Partner Dino Liistro

Morris v Leaney [2022] NSWCA 95

This recent NSW Court of Appeal decision addressed the duty of an architect in the provision of advice to clients on building costs.

The Respondent was an architect engaged by the Appellants for the purpose of assisting in the design of a home renovation. The Appellants alleged that the Respondent made representations regarding the cost of the renovations that constituted misleading and deceptive conduct and had breached tortious and contractual duties owed to them, when he advised them about the costs of a project and whether their objectives could be achieved within budget. The Appellants argued that had the architect fulfilled his duty and properly advised them regarding costs, they would not have undertaken the renovations. That is, the claim was brought on a "no transaction" basis.

At first instance the Court found that whilst the architect had not made misleading representations about costs, the architect had failed to advise, or sufficiently advise, the Appellants of the impact of their decisions or their ability to achieve a desired outcome within their budget. The trial judge, however, made no award for damages as he concluded that the Appellants had not suffered a loss. The decision was appealed on the basis that the trial judge erred on causation and damages.

The NSW Court of Appeal dismissed the appeal, as it was unable to conclude that had the architect not breached his duties under contract and tort that the Appellants would not have undertaken the renovations (i.e. on causation grounds). Had the Appellants succeeded in proving the "no-transaction" case, the Court of Appeal would have determined damages based on the difference between the cost of the renovation works and the associated increase in the market value of their home.

Implications

This case demonstrates the risks that architects are exposed to in advising clients on building costs, and the failure to remedy client misconceptions regarding what is attainable within the proposed budget and time frame. Ultimately, however, the architect was successful not because the architect fulfilled their duty, but because the Appellants failed to show that the architect caused their loss. The failure of an architect to adequately advise clients as to the costs and duration of works in a successful "no transaction" case may result in an exposure of significant damages far in excess of the fees levied for their work, based on the hypothetical quantification of damages suggested by this case, and will be influenced by fluctuating market values for properties.

TOO LATE FOR A PLUS ONE? JOINING PARTIES AS A CLAIMANT OUTSIDE THE LIMITATION PERIOD

Authors: Partner Patrick McGrath & Special Counsel Claire Gomo

Lendlease Engineering Pty Ltd v Owners Corporation No 1 [2022] VSCA 105 (8 June 2022) [29]

The Victorian Court of Appeal in this case considered the 10-year limitation period for building actions in circumstances where multiple occupancy permits are issued, as is the case in staged developments.

It was held that, where multiple occupancy permits are issued, the 10-year limitation period will commence from the date the occupancy permit is first issued in respect of the relevant building work the subject of the building action.

In the cross-appeal two Owners Corporations and 137 private lot owners sought to overturn the underlying decision of the Supreme Court, which had refused to allow the joinder of the private lot owners on the basis that, by the time the joinder application was made, their claims were out of time (i.e. beyond the 10 year limitation period in s134 of the *Building Act 1993* (Vic)).

The Court of Appeal refused to grant leave, upholding that the Tribunal does not have the power to join a party as a claimant to a proceeding when the limitation period has already expired even in circumstances where their claims are 'closely intertwined' with the existing claim brought by another party. In so holding, the Court of Appeal ruled that the Victorian Civil and Administrative Tribunal's earlier decision in *Owners Corporation PS 447493 v Burbank Australia Pty Ltd* [2013] VCAT 1911, which permitted the joinder of parties after the limitation period had expired, was incorrect.

[29] *https://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSCA/2022/105.html*

DOOR STILL OPEN FOR NEW DEFECT CLAIMS AFTER WARRANTY PERIOD EXPIRES

Authors: Partner Patrick McGrath & Special Counsel Claire Gomo

Owners of Strata Plan No 90018 v Parkview Constructions Pty Ltd [2022] NSWSC 1123

The Plaintiff is the Owners Corporation in respect of a strata title development in Haymarket comprising 286 residential apartments and associated parking and storage spaces. The development was designed and constructed by the First Defendant, Parkview Constructions Pty Ltd (**Parkview**) pursuant to a contract between the Parkview and the then owner of the site, the Second Defendant, The Quay Haymarket Pty Ltd (**Quay**). The List Statement alleged 85 defects in the common property and that each of those defects was caused by Parkview's breach of "one or more" of the statutory warranties specified in ss 18B(a)-(f) of the *Home Building Act 1989* (NSW) (**HBA**).

The decision before the Court was whether the Owners Corporation could amend its List Statement to: (1) add a claim against Parkview (but not Quay) for breach of the statutory warranty in s 37 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**); (2) add claims concerning the external façade of the building, coatings on the inside face of glass windows in the building and the stair pressurisation systems installed in the two towers and carpark of the building under ss 18C and 18D of the HBA; and (3) no longer press the claims for the 85 defects, which have either been rectified or are not pressed.

The Court ultimately granted the Plaintiff leave to file and serve an Amended Technology and Construction List Statement. Justice Stevenson confirmed that an owners corporation is entitled to add new defects to an existing claim for breaches of the statutory warranties under s 18B of the HBA, even if the two-year warranty period for non-major defects or six-year warranty period for major defects has expired.

Why Sparke Helmore?

Sparke Helmore's national Property and Construction practice, led by Partner Kiley Hodges, offers comprehensive expertise across construction and insurance law from front end contract and risk management to dispute resolution. Our clients benefit from our understanding of the lifecycle of projects and the complexity of the construction environment.

We are experienced in working in the construction insurance and reinsurance markets in Australia and internationally, advising on matters ranging from high-volume, low-value work to complex class actions. Our property practice covers both first and third party losses, ranging from small domestic claims through to complex Industrial Special Risk (ISR) matters, including claims, analysis, advice and recovery actions.

Collectively, our team has worked on large infrastructure projects, civil works (roads, tunnels and bridges), public transport, ports, rail, healthcare (hospitals, retirement and aged care facilities), water and wastewater, waste, mining and minerals processing, universities and commercial, residential and industrial buildings.

We also have extensive and complementary experience advising on construction-related professional indemnity matters for architects, surveyors, builders, engineers and heritage consultants. Accordingly, we know construction contracts inside and out, as well as the practical side of construction projects and disputes. We also have strong ties with industry including with the Australasian Professional Indemnity Group (APIG) and National Association of Women in Construction (NAWIC).

As a full-service firm, we can draw on resources from our broader Construction, Projects and Infrastructure specialists, as well as industry experts from our Workplace, Cyber, Technology, M&A and Government practice groups to assist in broader property and construction matters. Our membership with Global Insurance Law Connect network (of which we are the sole Australian member) allows us to service offshore property and construction related legal needs.

Contact details

To find out about the ways that we can help you, please contact a member of our team:

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