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WELCOME

Welcome to the fourth issue of the Construction Update, our annual review of the issues facing an industry responding to economic pressures and operational challenges.

From insurance for building projects to adapting to escalating climate risks, this edition deep dives into the pulse of Australia's construction industry. In our lead article, we explore the state of the industry, detailing labour market dynamics, supply chain pressures, regulatory shifts and compliance challenges, as well as future growth drivers. We also highlight the Federal and state building reforms that are rolling out to improve the regulation of Australia's building and construction industry and examine the central facts and findings of some recent and older cases on Property Damage. Add to that a spotlight on recent cases and legislation impacting New South Wales, Victoria and Queensland, and this issue delivers a comprehensive snapshot of the changes shaping the industry now and into the next 12 months.

If you would like any further information on the issues discussed, please contact a member of our team.

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AUSTRALIA'S CONSTRUCTION INDUSTRY: NAVIGATING TRANSFORMATION AND TURBULENCE

Author: Partner Kiley Hodges

Since our last Construction Update was released earlier this year, the Australian construction industry has demonstrated both resilience and volatility. Over the past nine months, the sector has continued to navigate economic headwinds, regulatory shifts, and ongoing labour shortages. At the same time, it has benefited from record levels of public investment and a growing emphasis on sustainability and innovation.

As the industry enters a defining phase, the balance between these challenges and opportunities is shaping a transformative future for construction in Australia.

Economic headwinds reshape Australia's construction landscape

The broader economic environment has significantly influenced construction activity across Australia. In 2024, Australia's GDP growth hovered around 1.2%, constrained by high interest rates and global economic uncertainty. By mid-2025, projections suggested a modest recovery, with GDP growth expected to reach 2.1%. However, this recovery has been uneven across sectors, with construction facing unique pressures.

High borrowing costs have dampened private sector investment, particularly in residential and commercial developments. Developers have been forced to delay or scale back projects due to elevated financing costs and inflationary pressures on wages and materials. Despite these constraints, public sector investment has surged, acting as a stabilising force and driving growth in infrastructure, healthcare, defence, and social housing.

Insolvency rates remain high, with 3,596 construction sector insolvencies recorded in the 2025 financial year.[1] Smaller subcontractors and suppliers are especially vulnerable, struggling to trade out of mounting debt. This has created a ripple effect, slowing apartment development and increasing costs for larger companies.

The divide between large and small builders is widening. While major contractors are showing signs of recovery, smaller companies continue to face financial instability. This fragmentation threatens to weaken the supply chain and prolong project delays.

Residential construction: public v private

Residential construction has been a focal point of both concern and optimism. The sector entered 2024 from a low base, with new home starts at their weakest in a decade. This was largely due to persistent interest rate hikes and supply-side constraints, including workforce shortages and material delays.

However, by late 2024 and into 2025, the tide began to turn driven by high demand for housing in major cities, with Sydney, Melbourne and Brisbane leading the charge. Government initiatives under the National Housing Accord and Housing Australia's pipeline of 185 projects have injected momentum into the market. These projects aim to deliver over 13,700 social and affordable homes, contributing to a broader goal of building 1.2 million homes by 2030. Government incentives for first-time buyers and low interest rates are contributing to a rise in residential development projects.

Master Builders Australia forecasts residential construction to grow from $73.1 billion in 2023–24 to $97.1 billion by 2028–29—a 32.8% increase over five years. This growth is largely driven by public investment, with private sector participation remaining cautious amid economic uncertainty.

[1] ASIC Insolvency Statistics: Series 1 and Series 2 | Published 24 November 2025

Non-residential and civil construction: infrastructure boom

Non-residential construction has fared better, buoyed by population growth and government-led infrastructure projects. The value of non-residential building activity is expected to total $285.6 billion over the next five years, a 7.3% increase compared to the previous five-year period.

Major projects such as the Western Sydney Airport, Melbourne Metro Tunnel, and upgrades to rail and road networks have created a robust pipeline of work. These initiatives are not only enhancing urban infrastructure but also generating employment and stimulating regional economies.

Civil and engineering construction has also seen substantial gains, particularly in disaster-resistant infrastructure. The increasing prevalence of natural disasters—floods, bushfires, and cyclones—has prompted a shift towards resilient design. Builders are now incorporating fire-resistant materials, flood barriers, and advanced sprinkler systems to meet evolving safety standards.

Cost escalation and supply chain pressures

One of the most persistent challenges throughout this period has been cost escalation. Although the volatility of the COVID-19 era has subsided, construction costs remain above historical norms but are stabilising. Labour shortages, fluctuating energy prices, and global trade uncertainties—particularly unresolved U.S. tariff policies—have contributed to this trend.

WT forecasts[2] that construction costs will rise by a weighted average of 5.2% across major cities in 2026, with Gold Coast, Sunshine Coast and Perth expected to see the greatest increases. Conditions around building approvals remain robust across Brisbane, however what was a slowness in approvals over the last two years has developed into a prolonged pause. In Darwin, building approvals have been strong in recent years and job vacancies have held at an elevated level. Sydney and Perth continue to experience softer market conditions and capacity for stronger building approval trends, despite strong public sector activity.

Material prices have begun to stabilise in some regions, offering relief to contractors. However, inflationary pressures on wages and compliance costs remain high, forcing developers to reassess project feasibility and timelines.

[2] WT Australian Construction Market Conditions Report November 2025

Labour market dynamics

The labour market remains a critical bottleneck.

The Federal Government's ambitious goal for building **1.2 million homes** over the next five years will require an additional **90,000 workers**, far more than the current workforce can supply.

Skilled labour shortages have plagued the industry, particularly in regional and remote areas. Fly-in-fly-out logistics, extended distances from suppliers, and environmental variables such as unpredictable weather have added complexity to regional builds.

Efforts are being made to improve diversity and inclusion in the construction workforce, increasing female participation and under-represented groups, but there is still a great deal of work to be done.

That is true also for training and upskilling, particularly in the use of digital constructions tool and sustainable building practices.

Regulatory shifts and compliance challenges

Regulatory changes have added another layer of complexity. Evolving regulations regarding building standards, safety, and zone by state, federal land local governments can increase the complexity of construction projects.

From January 2025, mandatory climate-related financial disclosures are required for large construction companies. These new compliance measures are part of a broader push towards sustainability and transparency, but they also impose additional costs and operational adjustments.

Cladding issues remain unresolved, with disputes and litigation continuing in relation to liability for installation, personal liability of directors, the application of insurance exclusions, strata funding for removal programs, new safety defects identified on removal, and issues arising out of newly developed replacement products.

Legislative reforms in some jurisdictions have improved payment security, but procedural fairness and enforcement mechanisms continue to be debated.

You can read more

About legislative change around building reforms on page 16 of this publication.

Sustainability and technological innovation

- Sustainability has emerged as a central theme in the industry's evolution. Builders are increasingly adopting sustainable building practices, including energy-efficient designs, low-emission materials, and waste reduction strategies. Government incentives and consumer demand are driving this shift, positioning Australia as a leader in sustainable construction.
- As sustainability becomes a key focus in the industry, there is a rising demand for construction methods that reduce carbon footprint. In line with this focus, there is rising investment in renewable infrastructure, such as solar projects, wind energy, rainwater harvesting, and battery storage systems to reduce dependency on fossil fuels, which is creating lucrative Australian construction market opportunities.
- Technological innovation is also reshaping the industry. Digital tools such as Building Information Modelling (BIM), 3D printing, drones and robotics, and AI and machine learning, are being used to enhance project planning and risk management. These tools enable contractors to significantly improve outcomes, manage market instability, and identify and manage cost overruns before they escalate.
- Modular construction and smart technologies are gaining traction, particularly in urban developments. These approaches offer faster build times, reduced waste, and improved quality control, aligning with the industry's sustainability goals.

Regional and remote construction: unique challenges

Construction in regional and remote areas presents distinct challenges. Scarcity of skilled labour, logistical hurdles, and environmental unpredictability increase costs and timelines. Builders must account for additional expenses related to accommodation, infrastructure, and regulatory compliance.

Success in these regions requires a strategic approach, including consultation with local experts, contingency planning, and real-time data analysis. Government incentives and targeted investment can help mitigate risks and unlock opportunities in these underserved markets.

Industry outlook: future growth drivers

Despite the challenges, industry sentiment is cautiously optimistic. Public investment is injecting stability and momentum, while technological and sustainability trends are creating new avenues for growth. The sector is expected to grow at a compound annual growth rate (CAGR) of 3.2%, reaching AU$660.27 billion by 2034.

Key drivers of future growth include:

Continued urbanisation and population growth

Expansion of healthcare and renewable energy infrastructure

Development of smart cities and affordable housing

Adoption of disaster-resistant and sustainable building practices

However, success will depend on the industry's ability to address labour shortages, manage cost escalation, and adapt to regulatory changes. Strategic partnerships, data-driven decision-making, and investment in workforce development will be essential.

Conclusion

The last two years have been transformative for Australia's construction industry. While economic pressures and operational challenges have tested resilience, the sector has responded with innovation, adaptability, and a renewed focus on sustainability. As the industry moves forward, it must balance risk with opportunity, leveraging public investment and technological advancement to build a more resilient and inclusive future.

> The road ahead is complex, but with strategic planning and collaborative effort, Australia's construction industry is well-positioned to thrive in the years to come.

A WHOLE NEW BALLGAME – INSURING YOUR TECHNOLOGY CONTRACTS

Author: Partners Hamish Fraser and Jon Tyne

The use of insurance in building projects and the need for suitable insurance is generally well understood. However, construction projects are increasingly incorporating a significant number of technology components. This includes robotic equipment used on site, the integration of technology infrastructure into the build itself, as well as and the digital tools that will be relied upon by the project managers and tradespeople throughout the project lifecycle.

While it may seem obvious that technology contracts differ from traditional construction contracts, it's worth exploring those differences. They point to the need for a distinct contracting model that reflects the unique nature of technology in construction.

1. Whilst a beam or a column has a particular location and materials, the technology is often invisible and cloud-based, delivered by unseen servers in remote locations.
2. Software and its hardware do not operate uninterrupted or error free and may not work with all hardware or interact will with other software, or worse stop working with new versions of other software or operating systems.
3. Software needs ongoing maintenance and support; in the cloud, software needs to be available.
4. If software doesn't work, it's usual to release a patch, but that may also mean new hardware and/or software needs to be acquired to run it.
5. Buildings are built to last; most hardware is obsolete in two years or less.

None of these issues are a surprise, but there are important differences when entering into a contract to acquire or use technology and they need to be managed.

This article looks to address both the meaning of some of the more construction-specific insurance clauses, dispel some common misconceptions and explore the types of clauses that may be beneficial to a digital contract.

Why require insurance at all

- It seems obvious to point out that a business takes out an insurance policy to manage risk. But why does an insurance clause find its way into a contract? What is it there for and what obligations should it impose on the parties involved?
- As with any mandated insurance, when acquiring digital services the customer should look to ensure its suppliers will survive misfortune – whether a business interruption, a claim from the customer (or the suppliers' other customers) or other business shock. Following that logic, it is also therefore prudent for the customer to ask to know, or perhaps even mandate, what insurance the supplier should have.
- Sometimes it is possible or even necessary for a particularly large project to have specific insurance (for example, a robotic auger drilling footing holes). However mostly the purpose of the insurance clause is to know and understand what protections the supplier has or should have to perform the work that is to be delivered.
- One function of these clauses is to mitigate contract risks that can be insured against – for example, the risk that a supplier that fails to meet its duties has no assets to meet a claim by the customer. However, another important purpose of the requirement to insure is to ensure, so far as possible, the supplier will remain financially viable and able to continue providing services.
- Insurance clauses, like so many clauses thought of as 'boilerplate', require planning and a consideration of the circumstances of the contract and a fair allocation of the risk between the parties. An understanding of the purpose of the insurance can go a long way to ensuring the right clauses are used for the right reasons, instead of the use of default language. As well as keeping contractual language clear and relevant, a tailored approach may simplify contract administration and could even improve pricing.

Common clauses

Below are some types of clauses or parts of clauses commonly found in contracts, highlighting strengths and weaknesses and also when and how they might be used.

Named on the policy: One misconception is that customers should **always** ask to be 'named' in the supplier's insurance policies. This misconception can lead to clauses that are more onerous than needed. Depending on the class of insurance product and the structure of the supplier's program, it may not be possible or practical to name the customer – or the insurer simply may not agree. While there are situations where naming the customer on the policy may make good sense, it's important to understand the possible implications for policy coverage – for example, some policies exclude claims made by one insured against another.

Noted on the policy: Like naming, a clause may ask that an interest be 'noted'. The problem with this kind of clause is that it may achieve very little, if taken literally. If a customer wants to have a right to access a supplier's insurance directly, the right it wants has to be set out clearly in the contract and must be available in the insurance market. Often, what a customer is really after is cover for liability claims against it that result from actions taken by the supplier on its behalf (a cover commonly available in the market). If so, the clause should be tailored appropriately.

Policy wording: Some clauses require the supplier to provide a complete copy of the policy wording, which is typically confidential between the contract and its insurer. It is not uncommon for insurers to refuse to allow the supplier to provide policy documents to others, and the supplier may not want to do so for its own risk management purposes. The customer should assess how critical it is to see contract wordings – in some cases, it will be important; while in others seeing a certificate of currency issued by the supplier's broker or insurer, or a summary of the insurance terms, will be sufficient.

Change of insurer: Clauses sometimes stipulate that the supplier must notify the customer of a change in insurer. This requirement is often unnecessary, especially when the contract already has sufficiently clear requirements for insurance.

Insurer rating: An insurance clause will commonly seek to ensure that any insurance taken has been issued by an insurer with a minimum rating from a credit rating agency. While this may give some comfort that the insurer is in a position to back their product, it may limit the supplier's access to other potentially acceptable insurance solutions.

Notice of any claims: A clause seeking to be notified of claims (unrelated to the contract) is likely to be misguided. If the reason for the policy is contract specific, then claims may be known in any case. If the reason is customer prudence, an unrelated claim on a policy may be of little relevance, providing there is ongoing cover, and could well be confidential.

Customer's liability cover (often called principal's liability cover)

Sometimes the risk that is appropriate to mitigate with insurance, is that a claim may be made against the customer based on the acts or omissions of the supplier, if acting on behalf of the customer. To take our robotic footings drill for example, a claim made against the owner of the land when a submerged cable is cut and the cable owner seeks to claim against the landowner with whom it has a contract.

Principal's liability cover extends a liability policy (taken out by the supplier) to provide cover for the loss of the customer in this scenario. This is to protect the customer in circumstance where it might have vicarious liability for the supplier's conduct. The need for this type of insurance might arise, for example, where the supplier may have some people located at the customer's premises (e.g., in software development, but this is becoming less common with the move to the cloud). Whilst the customer may already have its own insurance, it is possible (for example) that it doesn't believe it should pay for any premium uplift by having additional personnel and/or it may want to protect its claims record.

So what if you don't comply

One difficulty with insurance clauses is the consequences of a breach of the clause. It is well understood that damages for breach of a contract are there to put the party in the position it would have been in had the contract been performed.

Assuming the obligation to insure exists, working out what loss a customer has sustained because a supplier has not taken out a required policy is problematic. If there has been no loss for which the policy would respond, it is hard to envisage a loss caused by the breach. Equally, if the party that does not effect the insurance causes a loss, either it is capable of meeting the liability (so there is no need for a policy anyway) or it is not capable of meeting the loss, in which case it may become insolvent, and there will be little value in making a claim as there are no funds to meet it.

If the purpose of the requirement to be insured is what has been described above is a prudence exercise, then best practice is to follow up that prudence with a requirement to ensure the supplier does in fact hold the policies by way of certificates of currency or other means to confirming compliance.

Types of policies

A key element in mandating insurance in a contract is to understand the different types of insurance.

Claims made v occurrence policies: A claims made policy is a policy intended to cover claims made (or circumstances notified) during the term of the policy. A claim may not be made for a significant time – potentially many years – after the events which give rise to it. For this reason, it is common to require that runoff insurance for (commonly) seven years be maintained after the end of a contract. Professional indemnity insurance (discussed below) is usually a claims made policy. Occurrence policies, on the other hand, provide cover for claims arising from events that occur during the policy period.

Professional indemnity policy: A professional indemnity policy covers the risks taken by a business that provides professional advice or services (e.g., a doctor or a lawyer). If a supplier is giving advice, making recommendations or providing other professional services, a prudent customer would ask the supplier to hold professional indemnity insurance (and keep it for seven years after the end of the contract).

Public liability cover: This type of insurance typically covers personal injury and property damage. It is commonly written on an occurrence basis.

Cyber insurance: Increasingly, customers are requiring their suppliers to hold cyber insurance. The principal should give thought to what precisely they want the supplier to hold insurance against and the reasons why. Cyber insurance covers first party losses – such as the costs of responding to a cyber incident, which can ensure there is a financial 'safety' net and experts in place who can act quickly to rectify a breach. This class also often includes cover against third party claims based on a cyber event, but the scope of the cover can vary between products.

Other issues

Insurance brokers are an invaluable asset when a business is trying to assess suitable insurance needs, its risk and to investigate the market for insurance.

Conclusion

Our key tips

- Think about your contract wording and tailor it appropriately, rather than using 'default' clauses.
- Remember that insurance is only one way to manage risk – and that a supplier may pass on the cost of insurance it is required to take out to the customer. Decisions about the scope and limits of insurance required under a contract need to consider both the advantages and costs of managing risk in this way.
- Assess risk, determine who carries it, and choose suitable insurance – ideally with professional advice.
- Obtain evidence of cover and actively manage the contract.

2025 FORECAST OF FEDERAL AND STATE BUILDING REFORMS

Author: Partner Paul Tobin, Senior Associate Matt Byrnes and Lawyer Jake Hale

Housing shortages, builder insolvency, and quality issues are front and centre of reforms the Commonwealth, state and territory governments are rolling out to improve the regulation of Australia's building and construction industry.

This article breaks down the key changes proposed as of **September 2025**, and what these changes mean for Australia's building and construction industry.

Commonwealth

The Commonwealth Government has announced that after the 2025 version of the National Construction Code (**NCC**), updates to the NCC that are not for essential safety and quality will be paused until 2029.

Federal Minister for Housing, Claire O'Neil, has said this pause is to allow the Commonwealth Government to work with stakeholders to examine how the NCC can be streamlined to reduce the regulatory burden for builders and boost Australia's housing supply.

Australian Capital Territory

The ACT Government has announced that it plans to carry out a detailed review of the Territory's security of payment laws in late 2025.

The review will focus on improving fairness in the building industry and ensuring that contractors are paid within a reasonable time.

New South Wales

In June 2025, the NSW Government expanded the terms of its review into whether the policy objectives of the *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**) and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (**RAB Act**) were valid and being met, to also consider the NSW Government's proposed Building Bill.

The Building Bill is proposed to create a single, streamlined legislative framework for NSW's building and construction industry by consolidating the State's building legislation into a single Act.

There are no current timelines for when the NSW Government proposes to finalise its review into the DBP Act and RAB Act or introduce the proposed Building Bill into parliament, but we expect that the NSW Government will take the outcome of the review into consideration when preparing the Building Bill.

Queensland

The QLD Government has started on Tranche 3 of its 'Building Regulation Reno' by introducing the *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2025* (Qld). This Bill proposes to update how the Queensland Building and Construction Commission (**QBCC**) operates by:

a. removing legislative impediments that restrict the QBCC's ability to provide electronic services, such as the requirement for a QBCC licence to be issued in hard copy

b. providing greater operational flexibility for the QBCC by introducing a pathway to serve documents digitally and allowing QBCC customers to choose their preferred method of communication with the QBCC

c. changing the notification process for serious safety incidents on building sites so the regulator under the *Work Health and Safety Act 2011* (Qld) (**WHS Act**) or the *Electrical Safety Act 2002* (Qld) (**ES Act**) can promptly notify the QBCC about serious safety matters on building sites and the QBCC can respond with disciplinary action if necessary, and

d. removing duplicate reporting obligations for QBCC licensees by requiring notification only to the regulator under the WHS Act or ES Act, rather than also notifying the QBCC.

The fourth and final tranche of the Building Reg Reno, which is expected to bring further refinements to Queensland's regulatory landscape, is still to come.

Victoria

Of all jurisdictions, the Victorian Government has proposed the broadest reforms to its building and construction regulations, having introduced three proposed pieces of legislation into parliament:

a. the *Domestic Building Contracts Amendment Bill 2025*

b. the *Building Legislation Amendment (Buyer Protections) Bill 2025*; and

c. the *Building Legislation Amendment (Fairer Payments on Jobsites and Other Matters) Bill 2025*.

Note: The *Queensland Building and Construction Commission and Other Legislation Amendment Bill 2025* passed without amendment and is now the *Queensland Building and Construction Commission and Other Legislation Amendment Act 2025*.

Domestic Building Contracts Amendment Bill 2025

The *Domestic Building Contracts Amendment Bill 2025* proposes to amend the *Domestic Building Contracts Act 1995* (Vic) to include new and reformed rules for contracts between builders, owners and developers.

The new and reformed rules include:

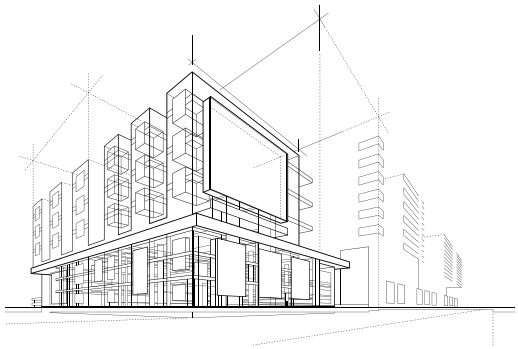
a. Cost escalation clauses may only be included in contracts worth more than $1 million and must not allow the Builder to increase a contract's price by more than 5% or for circumstances within its control.

b. 'Domestic Building Work' will no longer include the preparation of plans or specifications for domestic building work.

c. Owners may end major domestic building contracts if the contract's price rises by more than 15% or if the completion of the contract is delayed by more than 1½ times the period it was meant to have been completed within regardless of whether the builder was able to reasonably foresee those costs or delays when the contract was made.

d. Clarifying that if a developer and a builder divide what would be a single major domestic building contract into multiple contracts, then the contracts are taken to be a single contract for the purpose of the Act.

e. Clarifying that only certain parts of the Domestic Building Contracts Act will apply to building contracts between builders and developers.



Building Legislation Amendment (Buyer Protections) Bill 2025

The Building Legislation Amendment *(Buyer Protections) Bill 2025* proposes to broaden the scope and powers of the Victorian Building Authority (**VBA**).

The Bill proposes to establish:

a. Stronger powers for the VBA to order the rectification of defective, non-compliant and incomplete building work.

b. A statutory insurance scheme, managed by the VBA, which will insure owners of domestic buildings up to three storeys for the cost of rectifying incomplete, defective or non-compliant works on a 'first-resort' basis, even when the builder is operating in the building industry and without needing to undertake a dispute resolution process.

c. A developer bond scheme for domestic buildings over three storeys, modelled on the NSW Strata Building Bond and Inspections Scheme.

Building Legislation Amendment (Fairer Payments on Jobsites and Other Matters) Bill 2025

The Victoria Government has stated that the purpose of the *Building Legislation Amendment (Fairer Payments on Jobsites and Other Matters) Bill 2025* is to bring the State's *Building and Construction Industry Security of Payment Act 2002* (Vic) into line with security of payment legislation of the other states.

Changes proposed in this Bill include:

a. expanding the types of claims that may be adjudicated

b. removing the concept of reference dates

c. respondents may no longer introduce new reasons for withholding payment during the adjudication process, and

d. a requirement that a party must give at least five business days' notice before it calls on any security given under a construction contract.

Note:

- The *Domestic Building Contracts Amendment Bill 2025* passed the Victorian Parliament on 11 September 2025, now the *Domestic Building Contracts Amendment Act 2025*.
- The *Building Legislation Amendment (Buyer Protections) Bill 2025* has passed the Victorian Parliament and is now the *Building Legislation Amendment (Buyer Protections) Act 2025*.
- The *Building Legislation Amendment (Fairer Payments on Jobsites and Other Matters) Bill 2025* passed both Victorian Houses of Parliament on 30 October 2025 and received Royal Assent on 13 November 2025, now the *Building Legislation Amendment (Fairer Payments on Jobsites and Other Matters) Act 2025.*

Conclusion

The broad scope of these changes shows that the issues of efficiency, regulatory oversight and balancing the interests of principals and contractors in the Australian building and construction industry remains a topic for debate in our nation's legislatures and the community more broadly.

PROPERTY DAMAGE: IS IT ANY LIGHTER OUTSIDE AFTER CAPRAL AND FAIRVIEW?

Author: Special Counsel Victoria Huntington

In 2025, Australian Courts again had the opportunity to consider the availability of cover under insurance contracts for Property Damage when defective material had been incorporated into other property.

In the cases they considered, the Courts found that cover was available for Property Damage where there is a physical change to the property after a defective product is incorporated, accompanied by a loss of use of the property.

The Courts have again emphasised that the loss of use or functionality of the property alone, is unlikely to amount to Property Damage capable of attracting cover under a typical liability policy. The supply of a defective product before incorporation into the property is also unlikely to amount to Property Damage.

The 2025 and earlier decisions suggest that the Australian Courts have adopted a fairly consistent approach for more than 40 years.

Even so, there remains considerable uncertainty about when and if cover will be available for Property Damage in Australia because that will depend entirely on the nature of property into which the defective product is incorporated.

We examine the central facts and findings of some recent and older key Australian cases below.

Insurance Australia Limited t/as CGU Insurance v Capral Limited [2025] FCAFC 46 (3 April 2025)

Capral unknowingly supplied sub-standard aluminium plate to 10 of its customers. The plate was used by those customers in the construction of ships, boats, barges and a water tank. Due to a production error, the plate was found not to possess the corrosion resistance qualities for marine-grade use and could not be certified. The plate was subsequently recalled by the manufacturer but only after the plate had been incorporated into other property by Capral's customers.

Upon learning of the plate's non-compliance, each customer of Capral elected to remove the plate or reconstruct the impacted vessels. Capral paid $2,197,000 to settle its customers' claims.

Capral sought cover under its General Products and Liability Policy. Under that Policy, Capral was entitled to cover in respect of 'Compensation for… Property Damage'. Property Damage was defined to include:

> '*physical injury or damage to… tangible property...*'

After endorsing the meaning of the phrase 'damage to' given by the Supreme Court of Tasmania in *Ranicar v Frigmobile Pty Ltd*[3], the primary judge concluded that 'physical injury to tangible property' requires 1) a physical alteration of the tangible property, which 2) impairs its usefulness or value. In a case where a defective product is incorporated into the tangible property, the Court considered that the second requirement involves comparing the usefulness or value of the tangible property before and after the defective product is incorporated.

[3] Ranicar v Royal Insurance Pty Ltd [1983] Tas R 113

As to 1), the primary judge found that with respect to the marine vessels, there was a physical alteration of tangible property (ie the marine vessels) because putting on the defective plate involved welding it with filler alloy to the ship hulls. In respect of the water tank, the primary judge also found that the plate had to be similarly attached.

As to 2), the primary judge found that the marine vessels could not proceed to market without the plate being removed, and the cost of that removal was substantial. The Court inferred that the relevant property was less useful and less valuable to the customers immediately after affixing the plate than immediately beforehand: the marine vessels were rendered unsuitable, or at least less suitable, for the purpose for which they were constructed. A similar finding was made by the Court in respect of the water tank.

The Court concluded that when the plate was incorporated into the marine vessels and water tank, they were physically altered in a detrimental way and the customers had suffered Property Damage.

The appeal to the Full Federal Court was limited to two questions.

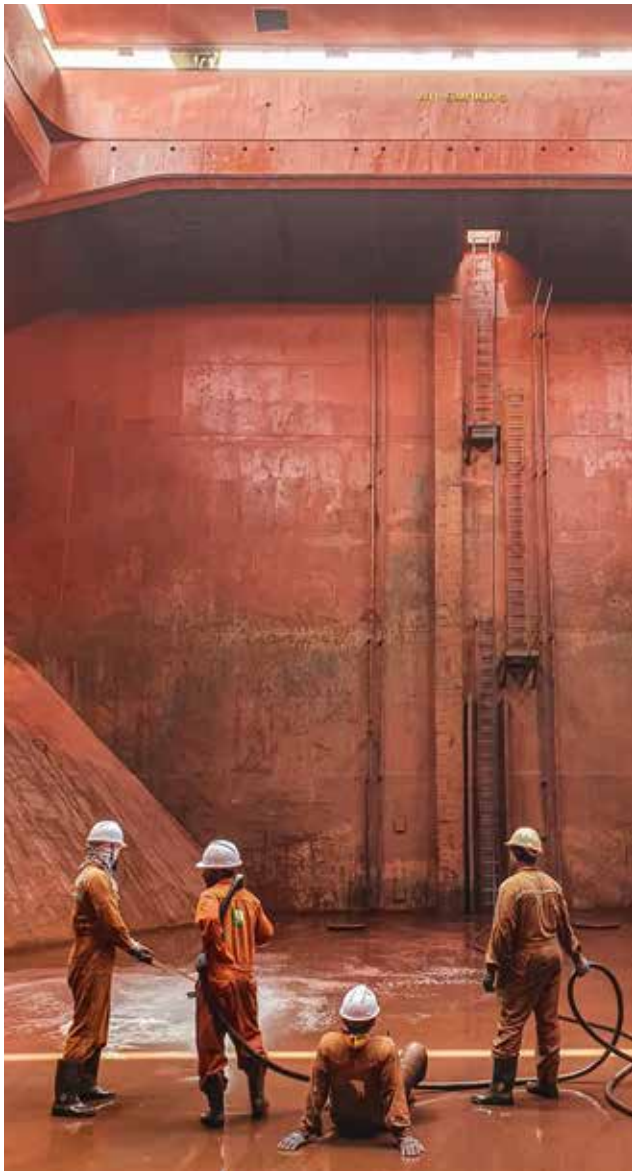
1

The first question was whether the claim by the customers was '*for Property Damage*'. The Court found that 'for' meant the same as 'in respect of' or 'on account of'. It was argued that the customers' claims were that the plate was not fit for purpose, and not that the claims were for Property Damage. The Court found that this submission downplayed the significance of money payments having physical damage to tangible property as their basis.

While the Court acknowledged that damage may have been caused by the customers' use of defective product, that did not mean that the claim was one for defective product or has a defective product as its basis or only basis. The question is whether the claim fits within the relevant insuring clause of the Policy (here liability for property damage) and not whether it might also have fitted into a different one (for example, liability for defective product).

2

The second question was whether the claim was excluded under the Policy because the plate was incorporated into vessels that were withdrawn from the market or from use because of a known or suspected defect. The Court found that the relevant exclusion only operated to exclude the costs of withdrawing a product from the market when a danger was apprehended. Here, the customer claims concerned rectification costs for property damage that occurred before any discovery that the plate was defective or any recall. The claim was not excluded.



AAI Limited v The Owners Strata Plan No 91086 [2025] FCAFC (4 February 2025); *The Owners Strata Plan No 91086 v Fairview Architectural Pty Ltd* [2023] FCA 814 (20 July 2023)

Fairview made and supplied Vitrabond aluminium composite panels. The Vitrabond panels consisted of two aluminium cover sheets and a core comprised of 50%-100% polyethylene, a highly flammable combustible plastic (**Vitrabond cladding**).

Between 2013-2015, the Vitrabond cladding was applied to the exterior of two high rise residential unit blocks for incorporation into the façades of the buildings. The Vitrabond cladding was attached to a metal subframe by high strength adhesive tape designed to withstand significant wind pressure. The metal subframe was then nailed into the concrete walls, steel struts and sarking that together comprised the walls of the building.

Fairview had taken out liability policies proving cover for third party claims for property damage, the latest one expiring on 30 May 2016.

In August 2018, a ban notice was issued by the NSW regulator as the Vitrabond cladding exceeded the allowable 30% polyethylene core.

In June 2019 - and well after Fairview's policies expired – the owners corporation in the buildings (**Owners**) commenced a class action against Fairview on its behalf and on behalf of the owners and tenants of the buildings, claiming loss and damage arising from the supply of the Vitrabond cladding, including the costs of removing the panels and repairing the buildings.

Fairview went into administration and the Owners sought leave to join Fairview's insurers to the action. Leave was granted and Fairview's insurers appealed the joinder order to the Full Federal Court.

Fairview's liability policies provided cover for liability to pay compensation in respect of Property Damage, which was relevantly defined to include:

> '*physical loss… or damage to tangible property*'.

There was no dispute that the combustible Vitrabond cladding made them defective and unsuitable for affixation to residential buildings. Importantly though, the Court found that making the buildings less suitable for use was not, of itself, capable of amounting to Property Damage under the Policy.

The Court found that fixing the defective Vitrabond cladding to the buildings caused physical damage to tangible property, the tangible property being the buildings and the subframe. Affixing the Vitrabond cladding to the subframe, which was itself affixed to the walls of the building, resulted in nail or screw holes in the concrete and steel walls of the buildings, as well as holes in the sarking that covered the walls. This was found to change the physical state of the building in a harmful way.

Removing the Vitrabond cladding from the buildings, meant that the subframe also needed to be removed, leaving possibly thousands of redundant holes through the buildings' structural walls as well as damage to or destruction of the subframe.

The Court also found that fixing the defective panels to the buildings made them less suitable for their intended use as residential housing even though the buildings were not uninhabitable: if there was a building fire, it would spread more rapidly.

Following *Ranicar*, the Court found that it was arguable that affixing the defective panels caused an immediate physical alteration to the buildings which affected their usefulness as residential buildings. This amounted to Property Damage under the Policy. Based on that preliminary finding, the Court granted leave for insurers to be joined to the action.

Any final determination as to whether the affixing of combustible Vitrabond cladding to the buildings amounts to Property Damage, will need to await judgment following a trial.

The preliminary finding that Property Damage occurred at the time the Vitrabond cladding was affixed to the building was critical, because Property Damage needed to occur during the policy period for cover to be available.

R & B Directional Drilling Pty Ltd (in liq) v CGU Insurance Ltd (No 2) [2019] FCA 458 (5 April 2019)

R&B was contracted to construct and install a tunnel underneath a railway line to carry high voltage cables.

The tunnel was created by forcing a cylindrical steel sleeve forward through the soil by hydraulic rams, with soil being flushed through the sleeve as it was rammed. Inside the steel sleeve, five concrete pipes were installed, through which the cables would be threaded. To keep the conduits in place, concrete grouting was pumped around the conduits and into the voids inside the steel sleeve.

When the concrete grouting was pumped, it entered a hole in one of the conduits, rendering it unable to carry the cable. A claim was brought against R&B for the cost of removing grout and conduit pipes from inside the steel sleeve so that the work could be repeated.

The liability section of the R&B's Policy included cover for Property Damage. Property Damage was defined to include 'physical injury… to tangible property'.

R&B argued that the tunnel was the tangible property, not the sleeve alone or the conduit pipes. R&B also argued that the physical injury to the tunnel was making the tunnel useless for its intended purpose, by the concrete grout hardening to fill the tunnel with five conduit pipes, only four of which were usable.

The Court was not persuaded that any material impairment of functionality or purpose amounts to physical injury to tangible property.

The Court instead found that the tunnel had not been damaged because it could be used again. The costs to repeat the work were not due to physical injury to the tunnel but were due to defective work: the removal of defective work from inside the undamaged sleeve, from inside an otherwise uninjured tunnel.

While there was a (temporary) loss of use of tangible property (the tunnel), the loss of use was not caused by physical injury to the tunnel, but by the placement of defective work inside the tunnel. Once the defective work was removed, the tunnel was left in the same physical state it had been in before the defective work. The removal of the defective work did not alter the tunnel's physical state.

The position may have been different if the concrete had not been able to be removed, or not been able to be removed without damaging the integrity of the sleeve. Had the Court come to a different view that there was physical injury to the tunnel, then Exclusion 4 (Faulty Workmanship) would have operated to exclude cover for the costs of removing the contents of the tunnel (concrete and conduits) and repeating the work.

Transfield Construction Pty Ltd v GIO Australia Holdings Pty Ltd (1997) 9 ANZ Insurance Cases 61-336 (12 July 1996)

The facts of this case closely resemble those of R&B.

Transfield contracted to construct grain silos. The relevant policy insured the works against physical loss or damage. A defect in construction caused the fumigation pipes in each silo to become blocked by grain. Transfield removed the grain and carried out repairs.

The NSW Court of Appeal was required to consider whether the blockage from the fumigation pipes by grain, so that the fumigants could not escape form the pipes into the silos, constituted physical loss or damage. The Court unanimously agreed that it did not and noted that:

> *No pipes were lost, no pipes were destroyed, no pipes were damaged. It is not contested that to remove the pipes and reinstall them would have caused a financial loss to [Transfield]. …Loss of usefulness might in some context amount to damage, though even that is not beyond dispute, but …it cannot amount to physical damage.*

The decision, which was cited with approval in R&B Drilling and elsewhere, stands as authority that lack of functional utility is not physical damage.

Austral Plywoods Pty Ltd v FAI General Insurance Company Limited [1992] QCA 4 (3 March 1992)

Austral Plywoods was a plywood manufacturer. Austral ultimately supplied marine plywood to a boat builder, who affixed it to the hull of a boat by glue and screws. The plywood was defective in that the bonding of the veneered surface was inadequate. The plywood needed to be removed from the boat, with consequential repair and installation of new plywood.

Austral sought to recover the costs from its insurer under a Broadform Liability policy. That policy insured Austral:

> *'for all amounts which [Austral] becomes legally liable to pay as compensation for… property damage caused by an occurrence in connection with [Austral's] business.*'

Property damage was relevantly defined in the Policy to mean '*physical injury to… tangible property*'.

The question for the Court was whether the affixation of the plywood to the hull caused physical injury to the hull. The Court found that upon the permanent affixation of the defective plywood to the hull, the hull was not only physically injured by the screw holes and glue, but was rendered unsuitable, or less suitable, for the purpose for which it was constructed. That is, it was unsuitable for use as a hull of a boat.

The Court found that if the plywood had not been defective, there would have been no physical injury to the hull capable of giving rise to a legal liability in Austral to pay compensation.

Key implications

In Australia, alteration to property by a defective product must involve some negative consequence to be properly characterised as Property Damage. This means that the availability of cover for Property Damage will depend entirely on the nature of property into which the defective product is incorporated, potentially creating uncertainty about the scope of cover available under a contract of insurance. This may have unintended consequences for insurers issuing standard liability policy wordings and for insureds who buy them. Bespoke cover may be preferable for larger projects if greater certainty is desired.

Even if the source of a third party claim concerns a defective product and cover is available elsewhere, that fact alone will not exclude a claim from cover if it is brought within the insuring clause of a policy for Property Damage. It follows that third party claimants (and their lawyers) are likely to take great care when they prepare and present significant claims, to increase their chances of having their claims met by insurers.

There are broader reaching implications beyond the cover provided for Property Damage in liability policies potentially extending to Construction Material Damage and Contract Works policies and beyond, where similar definitions of Property Damage to those considered by the Australian Courts so far, are frequently used. Careful attention to the wording of all policies providing cover for Property Damage together with any relevant exclusions at policy inception will ensure the cover provided is as contemplated.

A finding that Property Damage occurred at the time a defective product is affixed to or incorporated into property, may prove to be critical if cover is only provided for Property Damage that occurs during a policy period for cover to be available. If Property Damage is found to occur at the time of removal of a defective product, any previously available cover may have expired.

WEATHERING THE STORM: HOW AUSTRALIA'S CONSTRUCTION SECTOR MUST ADAPT TO ESCALATING CLIMATE RISKS

Author: Partner Kiley Hodges and Associate Brooke May

Australia is entering a new climate era. Extreme weather events such as cyclones, floods, bushfires, and coastal erosion are becoming more frequent, more intense, and more costly. For the construction industry, this shift is not just a challenge but a clear call to action.

Since 2020, Australia has experienced 14 declared catastrophes and 8 significant weather events, according to the Insurance Council of Australia (**ICA**).[4] The economic toll is escalating with the ICA reporting insurers paid out an average of $2.1 billion per year to customers over the last 30 years.[5] In the early 2000s, extreme weather cost the economy around $1 billion annually. That figure climbed to $2.7 billion in the 2010s and has now surged to around $4.5 billion per year between 2020 and 2024.[6] The two declared catastrophes in Queensland and northern New South Wales in the first half of 2025 cost insurers around $1.7 billion in claim payments alone, with approximately 25% of claims being made on commercial projects.[7] The construction sector, positioned at the intersection of infrastructure, housing, and community resilience, is feeling the strain.

The 2025 National Climate Risk Assessment, released by the Australian Climate Service, offers a sobering outlook. It forecasts more severe cyclones, storms, and riverine floods, alongside rising temperatures that increase the risk of bushfires and drought. Compounding and cascading hazards, such as flooding following cyclones, are expected to become more common. By 2050, more than 1.5 million Australians could be exposed to sea level rise and coastal flooding if current population trends continue.

While Northern Australia remains particularly vulnerable, the 2024 State of the Climate Report from the Bureau of Meteorology and CSIRO confirms that extreme weather is becoming more geographically widespread. Multiple states and territories are now being impacted simultaneously, placing unprecedented pressure on infrastructure and emergency response systems.

[4] 2025 Industry Snapshot – Insurance Council of Australia
[5] New data shows long-term cost of extreme weather - Insurance Council of Australia
[6] New data shows long-term cost of extreme weather - Insurance Council of Australia
[7] Insurance Catastrophe Resilience Report 2024-25 - Insurance Council of Australia
[8] Insurance and extreme weather: a test of national resilience - IAG

Insurance industry under pressure

Insurance plays a critical role in this evolving landscape. Over the past five years, the total insured cost of extreme weather events has reached $22.5 billion, averaging $4.5 billion annually. That's a 67% increase compared to the previous five years. Losses as a percentage of GDP have tripled since the 1990s, rising from 0.25% to nearly 0.75% in the first half of the 2020s.

These rising costs are reshaping the insurance market. Premiums are increasing, particularly in high-risk regions and largely due to supply chain pressures and increasing reinsurance costs, according to Insurance Australia Group Limited.[8] Under-insurance is becoming more common, and policy disputes, especially around definitions of flood and storm have highlighted the need for clearer policy language. The industry is also grappling with claims cost inflation, driven by rising construction costs and more granular risk-based pricing. This has made insurance less affordable, especially in Northern Australia and other high-risk locations, deepening the divide between those who can afford to rebuild and those who cannot. Failure to rebuild after a significant event hinders the ability of communities to recover following an extreme event which also has lasting impacts on the local economy.

In response, insurers are investing in better systems and staffing, particularly following the 2022 Brisbane floods and the recommendations of the Inquiry into insurers' responses to 2022 major floods claims. During Tropical Cyclone Alfred, the industry mobilised early, contacting over 250,000 at-risk customers, deploying hundreds of additional claims staff, and securing local builders and suppliers. These proactive measures are becoming the new standard.

Construction industry at a crossroads

For the construction industry, climate change means rethinking everything from site selection and building materials to project timelines and insurance coverage. Builders and developers must now factor in not only the immediate risks of extreme weather but also the long-term implications of climate change on asset durability and community safety. This also requires navigating a more complex insurance environment, where coverage terms, exclusions, and sub-limits are under tighter scrutiny.

Extreme weather events also disrupt supply chains, delaying delivery of materials and inflating overall project costs and deadlines. Construction firms should consider diversifying suppliers, building local inventories, and incorporating supply chain risk assessments into project planning and costing. This is especially important for remote or disaster-prone regions.

The industry can also invest in upskilling workers to handle climate-resilient construction techniques, new materials, and technologies. Training could include flood-resistant design, fireproofing, and the use of predicative tools like Building Information Modelling (**BIM**) and AI. Workforce readiness will enhance delivery of resilient infrastructure at scale.

Technology is playing a transformative role. Artificial intelligence is increasingly used to model and predict outcomes, offering new tools for risk assessment and project planning. For construction professionals, this opens up opportunities to integrate predictive analytics into design and development processes. Tools like BIM and smart contracts, where extension of time (**EOT**) approvals are automated based on real-time data, can improve risk management and streamline on-site processes. Currently, AS4000 and standard building contracts allow for an EOT for weather delays although require robust supporting evidence. Implementation of smart contracts can assist in overcoming those issues although they are not a complete solution. The utilisation of technological advancements in projects is likely to play a significant role in reducing costs and meeting project deadlines with principals and contractors able to access the same-real time data.

Fast-paced regulatory overhauls are also driving operational change in the construction industry. In particular, the National Construction Code 2022 mandates resilience measures, such as enhanced drainage for flood-prone areas; non-compliance with these measures could enhance the risk of defect claims which will have long term impacts on those contractors insurance premiums.

Innovative approaches to sustainable construction are gaining momentum as industry standard and government targets converge. Net-zero designs promoted by the Green Building Council of Australia align with 2035 renewable energy goals outlined by the Commonwealth Government, and arguably enhance project bankability. There is also increasing interest in low-carbon and climate adaptive materials, such as permeable concrete, fire-resistant cladding, and modular systems that allow for faster rebuilds. Utilisation of Environmental, Social and Governance (**ESG**) frameworks can also assist construction firms in reducing costs with premium discounts provided in certain circumstances.

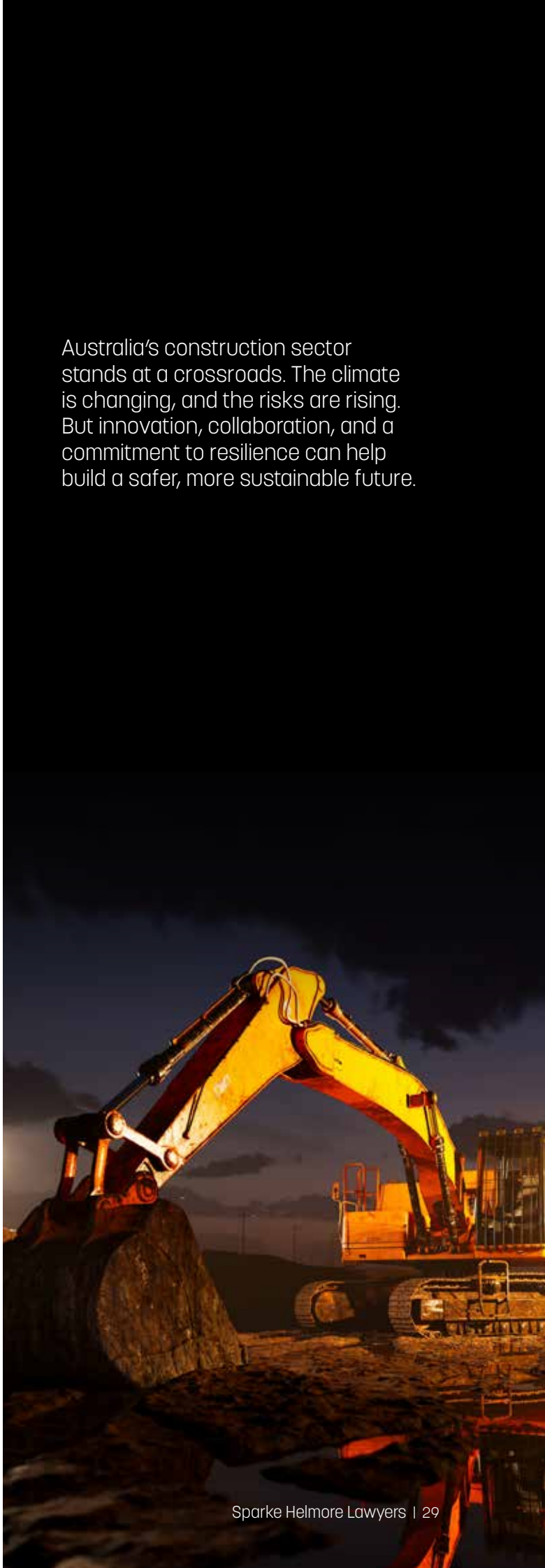
Building forward with resilience

Regulatory authorities also have a role to play, holding the power to mandate change. While achieving legislative and regulatory change is slow, the construction and insurance industries have been supporting the process through advocacy. We also expect positive change to result from the National and Queensland Government Productivity Inquiries.

To protect against weather related risks, our top tips for builders and contractors include:

- using flexible and broad contract clauses where possible to reduce the risk and burden of project deadline extensions
- securing comprehensive insurance being mindful of 'expected' weather events given climate changes and increases in the frequency of significant weather events
- implementing on-site mitigation techniques to reduce the impact of severe weather events including the appropriate diversion of water ingress and similar measures
- adopting BIM and smart contracts where appropriate to reduce extension timeframes and secure EOT approvals quicker and easier, and
- prioritising ESG early on in the project to mitigate risks of non-compliance with insurance policies and/or industry standards which will also attract investment and therefore enhance project bankability.

Australia's construction sector stands at a crossroads. The climate is changing, and the risks are rising. But innovation, collaboration, and a commitment to resilience can help build a safer, more sustainable future.



THE IMPORTANCE OF TIME BARS AND CONTRACTUAL CLAIM REQUIREMENTS

Author: Partner Darren Rankine, Special Counsel Samantha Smith, Senior Associate Tasha Wolodko-Kouril, Lawyer Caitlin Woods

Rimfire Energy Pty Ltd v BSF Co Pty Ltd (No 2) [2025] FCA 384 and *Colormode Pty Ltd v Civic Construction Group Pty Ltd* [2024] QDC 148

Time bars and contractual claim requirements are a common – and often unforgiving – feature of construction contracts. They are designed to promote certainty, ensure timely notice of issues, and allow parties to manage project risks as they arise. However, the consequences of failing to comply can be severe, as courts continue to enforce these provisions strictly. Two recent decisions, *Rimfire Energy Pty Ltd v BSF Co Pty Ltd (No 2) and Colormode Pty Ltd v Civic Construction Group Pty Ltd*, underscore the importance of complying meticulously with contractual claim processes.

Rimfire Energy Pty Ltd v BSF Co Pty Ltd (No 2) [2025] FCA 384 (Rimfire)

Background

Rimfire Energy Pty Ltd (**Rimfire**) entered into two Power Purchase Agreements (**PPAs**) for the development of a solar farm and a gas-fired power station with BSF Co Pty Ltd and HCPS Co Pty Ltd (collectively, the **Owners**). When the projects failed to achieve commercial operation by the contractual dates, Rimfire issued invoices to the Owners for liquidated damages. The Owners disputed liability, arguing they were entitled to extensions of time (**EOTs**) under the PPAs as they had issued EOT claims.

Decision

Justice O'Callaghan of the Federal Court of Australia held the Owners' EOT claims were invalid because they failed to comply with contractual preconditions, including that the notices did not include sufficient particulars or supporting evidence to establish that delays were not caused by the contractors engaged by the Owners or the Owners themselves. Even if valid, the claims were also out of time, as the Owners failed to prove that the claims were made within 10 business days after the full effects of the delay events had been determined by the Owners. His Honour emphasised that timely, detailed notice was a fundamental part of the contractual mechanism for extending time.

Key takeaway

This case demonstrates the courts' willingness to enforce time bars strictly, regardless of the practical consequences. A claim that fails to meet all contractual notice requirements is liable to be struck out entirely.

Colormode Pty Ltd v Civic Construction Group Pty Ltd [2024] QDC 148 (Colormode)

Background

Civic Construction Group Pty Ltd (**Civic**) engaged Colormode Pty Ltd (**Colormode**) to perform painting work to a residential apartment project under a series of subcontracts (**Contracts**). The Contracts required Colormode to submit its final payment claims (and required documentation) within set periods of time, failing which the claims would be barred. A dispute arose after Colormode sought payment for variations and return of retention moneys but had failed to submit these claims within the time set out in the Contracts. As the work subject of the Contracts had not reached practical completion by the dates required by the Contracts, Civic responded by claiming a substantial amount in liquidated damages.

Decision

Judge Barlow KC of the District Court of Queensland held Colormode's claims were barred. The court found that the contractual regime was clear and unambiguous, in that failure to submit a final payment claim (and required documentation) within the prescribed timeframe meant Colormode had no entitlement to make a claim for final payment for works under contract or for any other claim whatsoever in connection with the subject matter of the contract – including a claim for release of certain retention moneys that would otherwise have been released.

His Honour further found that Civic was barred from claiming liquidated damages as it had failed to include this claim in a final certificate (which was in fact not even issued by the superintendent), and the superintendent had neither, in any event, certified liquidated damages in the time allowed before the issue of the final certificate. His Honour rejected arguments that strict enforcement was unfair or unconscionable, reaffirming that commercial parties are bound by the bargain they strike.

Key takeaway

The decision reinforces that courts will uphold time bar clauses in construction contracts, even where the result appears harsh. Contractors cannot rely on equitable arguments to excuse non-compliance.

Practical tips: managing time bars in construction contracts

For Contractors

1. Diarise deadlines: Record all contractual notice periods at project commencement.
2. Provide detail: Notices must include all required particulars and supporting evidence.
3. Act promptly: Do not wait until impacts of a delay are fully known — submit initial notices in time and update as required.
4. Keep records: Maintain contemporaneous project documentation to substantiate claims.

For Principals

1. Draft clearly: Ensure time bar and notice clauses are unambiguous.
2. Monitor compliance: Check notices issues by contractors carefully against contractual requirements.
3. Hold the line: Be prepared to enforce time bars where claims are late or defective.
4. Manage risk: Consider whether strict enforcement aligns with broader commercial objectives.

Conclusion

Rimfire and Colormode serve as reminders that time bars and claim requirements are not mere formalities. Contractors must strictly comply with both timing and content requirements for notices issued under contracts to preserve their entitlements. While principals can take comfort that courts are prepared to enforce these provisions as written, they must also make sure that they (or their superintendents) also comply with the contract provisions to preserve their entitlements.

SPOTLIGHT ON NEW SOUTH WALES

The NSW Government's Principles for Partnership with the Construction Industry: purpose, opportunities and industry reactions so far

Author: Partner Carly Roberts, Special Counsel Caitlyn Read and Paralegal Sofia Pauley

In response to changing market forces and with a view to improving collaboration with the construction industry, in late 2024 the NSW Government moved beyond its 2018 'Ten Point Commitment to the Construction Sector' (Ten Point Plan) and transitioned to a new framework – the Principles for Partnership with the Construction Industry (Principles). In this article we explore the purpose of the Principles, the opportunities they present for the construction sector and how the industry has reacted in these early days of implementation of the Principles.

The shift from the Ten Point Plan to the Principles

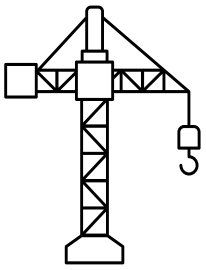
Prior to the release of the Principles in 2024, the Ten Point Plan set out the NSW Government's commitment to strengthening the construction sector. The Ten Point Plan was designed to increase supply-side capacity, reduce industry costs through more efficient procurement, develop the construction sector's workforce, encourage culture change and diversity and foster collaboration between the public and private sectors to support innovation.

Between 2018 (when the Ten Point Plan was released) and 2024, the construction sector faced challenges that prompted the NSW Government to refresh its guiding principles for collaboration with construction industry participants. Notably, the landscape changed as a consequence of COVID-19, supply chain risks, increased economic pressures resulting from cost escalation and a surge in industry insolvencies. In addition to these challenges, the industry has suffered from persistent labour shortages and skills gaps, which are predicted to persist in many construction-related occupations in NSW.

Purpose of the Principles

The Principles were developed to:

- help with the construction industry's understanding of government priorities
- focus on social policy objectives in the construction sector
- address current construction sector challenges, and
- strengthen collaboration between government and industry.



Ultimately, the Principles are a tool to help deliver the NSW Government's **$119.4 billion** infrastructure pipeline in an effective and sustainable manner.

As depicted in the infographic below, the key objectives of the Principles include stimulating the local construction industry and increasing opportunities for local businesses, making the construction sector a safer and more inclusive place to work, taking action to improve efficiency and productivity, building a highly skilled and competent workforce, increasing diversity and equity, mitigating financial capacity risks and achieving Net Zero by 2050.

To assist with the implementation of the Principles, there are clear 'next steps' attached to each Principle that set out the NSW Government's commitments and what the NSW Government asks of its industry partners. There are also 'examples of good practice' for each Principle, which demonstrate how the Principle can be practically applied. Compared to the Ten Point Plan, however, one of the most interesting features of the Principles is the clear focus on shared actions, described as 'together we will' next steps.

This emphasis on shared commitments and collaboration reflects one of the key shifts from the Ten Point Plan, which was more focused on government action when compared to the joint approach seen in the Principles.

Encourage the development of local industry and manufacturing capability, including by collaborating early in the design process to increase opportunities for modern methods of construction.

Build up domestic manufacturing

Proactively prioritise worker health, safety and wellbeing (including good mental health).

Ensure safety and wellbeing

- Better identify key areas of productivity improvement.
- Pursue immediate efficiency opportunities, including streamlining government tender processes, improving early market interactions, encouraging innovation and adopting digital practices.

Boost productivity

- Invest in people, upskilling and building capability across the workforce.
- Provide opportunities for diverse and underrepresented groups.
- Boost skills and employment opportunities for local people and businesses.

Invest in skills and local jobs

- Increase diversity on sites and in organisations.
- Model inclusive and collaborative behaviours.
- Foster a culture of trust.

Enhance industry culture and diversity

- Improve financial capacity risk identification and mitigation.
- Explore collaborative approaches to risk allocation.
- Identify appropriate actions to support financial sustainability.
- Promptly resolve project issues and claims.

Improve financial sustainability

- Decarbonise infrastructure delivery to support the achievement of NSW Government decarbonisation commitments.
- Collaborate to uplift existing carbon management.

Decarbonise to meet Net Zero targets

This infographic provides a high-level summary of the NSW Government Principles for Partnership with the Construction Industry. Please see here for more information.

Opportunities for construction industry participants

We have explored the objectives of the Principles at a macro level, but the Principles also present opportunities at the micro level. Industry participants might ask, 'what's in it for me?'. The Principles give industry participants opportunities to increase their own commercial success at the same time as contributing to the success of the construction sector more broadly.

The Principles offer industry participants the chance to gain a competitive advantage by demonstrating strong performance in areas such as safety, wellbeing, culture and diversity. The opportunity for an industry participant to set their operations apart from their competitors may help participants stand out favourably in the market. Strategic alignment with the Principles not only facilitates this competitive advantage, but also helps industry participants be better prepared for the trajectory of the sector. As the NSW Government continues to roll out policies and guidelines on decarbonisation, sustainability and diversity and inclusion, industry players that embed practices consistent with the Principles early will be better placed to capitalise on the state's infrastructure pipeline.

Taking a look at the opportunities presented by a few of the individual Principles:

The commitment to exploring 'collaborative approaches to risk allocation' as part of the 'Improve Financial Sustainability' Principle, and the related goal of addressing financial capacity issues, should improve the financial health of industry participants and the broader sector. A refreshed focus on practices like ensuring timely payments to subcontractors will not only strengthen industry resilience but also protect industry participants' long-term financial viability.

The adoption of digital tools, data standardisation and modern methods of construction, as encouraged by the 'Boost Productivity' Principle, should not only improve lagging productivity in the sector but also in industry participants' individual businesses. Those who embrace these changes will reduce inefficiencies and gain a first-mover advantage.

Workforce considerations sit at the heart of the Principles. By prioritising safety, wellbeing and diversity, in line with the 'Ensure Safety and Wellbeing' and 'Enhance Industry Culture and Diversity' Principles, industry players will be better positioned to attract and retain talent in a sector facing skills shortages. A stronger focus on inclusion should help industry participants build more resilient and capable workforces, while making the sector a more attractive career choice.

Overall, the Principles invite industry participants into a dialogue with the NSW Government. Industry participants have the opportunity to influence policy, shape project specifications and ensure that industry perspectives are reflected in decision-making. This collaborative approach gives industry players the opportunity to actively participate in defining the future of infrastructure delivery in NSW.

Industry reactions so far

The Principles are still relatively new, but early reactions from industry participants have been cautiously optimistic. Industry organisations have specifically welcomed:

- recognition that 'contractors of all sizes need fair opportunities' (Civil Contractors Federation NSW), reflected in the Principles by the commitment to increase opportunities for local jobs, local manufacturing and small businesses
- the NSW Government's commitments to focus on financial sustainability and to tailor performance security requirements to align with financial capacity risk profiles (Civil Contractors Federation NSW), and
- the Principles' acknowledgement of the need to improve industry capability and capacity (Australian Constructors Association).

Industry is interested in watching how the NSW Government implements the Principles over the long term, to see whether the Principles' objectives are achieved. Despite the general cautious optimism around the Principles, industry organisations have expressed that the Principles should not add more 'red tape', and the focus on collaborative contracting and reimbursement of bid costs (key elements of the Ten Point Plan) should not be lost sight of.

Infrastructure NSW has committed to publishing annual reports to document progress against the Principles. Industry will no doubt be keeping a keen eye out for the first report, due in December 2025.

Conclusion

The Principles present a practical tool for the NSW Government to collaborate with industry participants to promote a sustainable, inclusive, safe and efficient construction industry that can capitalise on the opportunities presented by the State's infrastructure pipeline. For industry participants, there are real commercial and strategic advantages that can be realised by aligning organisational practices with the Principles. It will be interesting to see how the implementation of the Principles has tracked over its first year, once Infrastructure NSW's first annual progress report is available.

NON-DISCLOSURE UNDER THE *INSURANCE CONTRACTS ACT 1984* – SECTION 21

Author: Partner Julian McGrath

Absolute Tiling Solutions Pty Ltd v Certain Underwriters at Lloyds [2024] NSWSC 364

Facts

Absolute Tiling was subcontracted and undertook the design and installation of sandstone cladding at a mixed-use development site being constructed by Toga Constructions NSW Pty Ltd. Following completion of the cladding, some sandstone tiles had begun to detach themselves and, despite rectification works, continued to become detach. Toga Constructions made a series of written demands for these works to be rectified. Absolute Tiling then notified these demands to Underwriters on 4 August 2020.

In response, underwriters declined liability to indemnity on the basis of Absolute Tiles' asserted failure to comply with its disclosure obligations and under certain exclusions of the policy.

Claim was denied.

Reasonable Person – section 21 (1)

The Court recorded that s 21(1) of the *Insurance Contracts Act 1984* (Cth) applies when an insured knows a matter to be relevant to the insurer's decision to accept the risk or where a reasonable person in the position of the insured could be expected to know it to be a matter so relevant.

The Court adopted what was said by Meagher JA in *Prepaid Services v Atradius Credit Insurance* at [98] that: 'The duty of disclosure under s 21(1) is a duty to disclose what is known to the insured before the relevant contract of insurance is entered into.' That is the time when the contract is made or indeed renewed.

It was uncontroversial that Absolute Tiling had not disclosed the cladding issue/ incident before renewing its insurance, so Underwriters took the view that Absolute Tiling had failed to comply with their disclosure requirements at the time of renewal, justifying the denial of indemnity.

Further, the Versatile Group (Absolute Tiling's group company) had in fact disclosed that one of its subsidiary/associate companies was expressly seeking cover for the purposes of constructing residential apartments (which the trial judge found was likely to have included some form of external cladding), but that no follow-up queries had been asked, or concerns were raised by Underwriters, as a result of that disclosure. Instead, cover was provided on the basis that the 'Cladding Endorsement' was included [218].

The Court further noted that the proposal forms for the 3 policies did not raise any questions as to whether or not external cladding works were undertaken. In correspondence following the submission of these proposals, there was not a single question directed to the brokers or conveyed to Absolute Tiling making that inquiry [214].

In the Underwriters' forms on assessing risk, there was nothing referring to the installation works, of which the tile cladding constituted a component.

The Court concluded

The Court concluded that a reasonable person in the position of Absolute Tiling could not have been expected to know that the fact that it conducted external cladding works was a matter relevant for underwriters' consideration in placing cover and renewing the risk. In these circumstances, Absolute Tiling had no duty under s 21(1) of the ICA to disclose those matters.

SPOTLIGHT ON VICTORIA

Changes to domestic building insurance in Victoria

Author: Partner Patrick McGrath and Paralegal Cindy Nguyen

Victoria's new *Building Legislation Amendment (Buyer Protections) Act 2025* (Vic) (**Act**) represents a significant restructuring of the domestic building regulatory landscape.

With a scheduled commencement date of 1 July 2026, the reforms will not only reshape consumer protection and enforcement for residential construction but will also alter how defects risk in claims against builders, developers, subcontractors and other construction professionals will be managed and defended.

Shift to a first-resort Statutory Insurance Scheme (Apartment Buildings up to Three Storeys)

A key feature of the Act is the introduction of a statutory insurance scheme (**SIS**), which will provide domestic building insurance on a first-resort basis for residential apartment buildings up to three storeys and valued at $20,000 or above.

Under the new model, building owners will be able to claim directly on the SIS for loss suffered from incomplete, defective and non-compliant domestic building work, without first having to participate in dispute resolution processes or requiring insolvency, death, or disappearance as a precondition to a claim. This first-resort structure is being introduced to accelerate rectification and compensation processes.

The SIS will be administered by the Building and Plumbing Commission (**BPC**) as a government monopoly, as the sole provider of insurance, limiting the participation and reliance on traditional private insurers. Builders will be required to pay an insurance premium before work begins, however owners will still be covered if they do not. Residential apartment buildings over three storeys will be excluded from the SIS and instead covered by the new developer bond scheme.

Once a claim under the SIS is accepted, the BPC may use its new powers under the Act to issue rectification orders. If they fail to do so, the BPC may rectify or complete the works directly and then take disciplinary action against the responsible builder or related parties in order to recover costs.

The model is designed to reduce the number and value of insurance payouts by enabling regulatory intervention at an earlier stage. Rather than relying solely on indemnity payments, the BPC can compel builders to complete or repair defective work. Whilst this approach is intended to provide homeowners with stronger protection and faster outcomes, premiums are expected to increase to reflect the greater likelihood of claims being made and the broader scope of insurer involvement in rectification work, including insurer providing greater support for consumers when dealing with builders. This increase is expected as required by the Act that the premiums are to be at a level that makes the scheme sustainable.[9]

In some respects, the experience in New South Wales is instructive. The *Design and Building Practitioners Act 2020* and the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* have been in force since 2021. The system is the subject of a current review with the Public Accountability and Works Committee of the NSW parliament conducting an enquiry and review of the legislation. Some of the submissions to the Committee are instructive.

The Master Builders Association of New South Wales (MBA) has recently lodged a submission to the Committee claiming that the system is not working and has created an overly complex regulatory system that is being applied even to smaller scale apartment developments (less than four storeys). The administrative burden imposed by the legislation is also said to be a major detractor for builders operating in that State.

In addition, substantially increased insurance premiums for professional services such as designers, architects and engineers are being passed down and resulting in increased fees for service and hourly rates, which are ultimately driving up the cost of construction.

The submission notes that the continued inability for builders to obtain any sort of indemnity insurance because it is viewed as too risky and insurers will not participate (despite assurances before the commencement of the DBP Act) have increased risk exposure, and costs.

It is further claimed that the regime is substantially increasing front-end costs on construction projects. The legislation has, it is asserted, allowed strata owner corporations to issue unjustified defects lists and non-compliance notices, including after 10 years which has resulted in a regime whereby builders consider they are being made responsible for ongoing maintenance of apartments for immaterial items that ought not be considered defects. The application of the legislation to maintenance works and not simply new builds is also criticised.

Victoria may see similar issues arise on the commencement of the Act, although some features of the NSW regime that are now being criticised (e.g. application to developments under four storeys) have already been addressed. We anticipate that Owners Corporations will be lobbying the BPC to issue rectification orders (discussed below) in relation to claimed defects and the BPC's approach will determine whether the NSW experience is repeated in Victoria.

It will be interesting to see whether insurance is available to fund the first-resort SIS in this context, given the real risks that the BPC's approach will very much determine how that insurance is accessed, at what stages and whether it is being routinely called upon in relation to the 'maintenance items' that are discussed in the MBA (NSW) submission.

[9] *Building Legislation Amendment (Buyer Protections) Act 2025* (Vic) s137Q (4)(a)(i).

The BPC will be able to make rectification orders

The Act empowers the BPC to issue rectification orders to a person who carried out the building work for incomplete, non-compliant and defective building work, on any property type, during construction up until 10 years have elapsed following the issuance of an occupancy certificate.

To ensure that even unregistered persons can be held accountable, the power to make orders will extend to registered domestic or commercial builders, builders without practitioner registration, subcontractors, and others responsible for the works.

The impact of these rectification orders may be to bring claims forward in the dispute resolution process, with notifications being made by a wide range of insureds as soon as the BPC rectification orders are received, rather than after the initiation of traditional private disputes between the parties involved in the construction project. This may give rise to earlier and wider claim notifications than otherwise might have arisen in the past. That is, where rectification works require the involvement of multiple parties, as will often be the case, the BPC rectification orders may be cast widely and necessitate actions being undertaken by a number of participants in the construction project in response.

Transitional period uncertainty

Given the Act does not expressly clarify whether the provisions will apply to existing projects or contracts entered into prior to the Act's commencement, unless it is resolved prior to the Act coming into force, there may confusion about which regime applies.

In the absence of clarification, delays as well as increased financial burden can be expected as it is unlikely the costs associated with this reform were incorporated into current projects. The commencement date of the Act will therefore likely act as a catalyst, or at the very least a strong incentive to expedite the completion of projects prior to 1 July 2026, or whatever date the Act is proclaimed.

FAIR PAYMENTS AND A LEVEL PLAYING FIELD FOR CONTRACTORS

Author: Partner Patrick McGrath and Paralegal Cindy Nguyen

The *Building Legislation Amendment (Fairer Payments on Jobsites and Other Matters) Act 2025* (Vic) (**Act**) passed both Houses of Parliament on 30 October 2025 and received Royal Assent on 13 November 2025. Designed to amend the *Building and Construction Industry Security of Payment Act 2002* (Vic) (**SOP Act**), the *Building Act 1993* (Vic) and other Victorian legislation, the Act gives effect to many of the recommendations made in the 2023 Parliamentary inquiry into subcontractor protections (**Inquiry**). The Inquiry found persistent inequities in how payment risk was being allocated between contractors and subcontractors for completed works. It found that late or withheld payments, onerous notice requirements and prolonged retention of security were placing unsustainable pressure on subcontractors and smaller contractors. A number of recommendations were made and the Victorian Government's support for those recommendations is reflected in the Act.

The Act introduces significant changes to the SOP Act. Six of the key changes are summarised below:

1

Statutory right to claim release of security and notice of intention to call on security

The Act introduces an express statutory right to make independent claims for the release of performance security, including guarantees, retention moneys, and bonds.

Further, under the Act, principals will not be able to call on performance security unless they give at least five business days' notice of their intention to call on that security.

2

Unfair notice-based time bars

Adjudicators, courts, and arbitrators may declare a notice-based time bar clause unenforceable and of no effect if compliance is 'not reasonably possible' or is 'unreasonably onerous'.

This 'fairness circuit breaker' which exists in the Western Australian security of payment legislation, is designed to ensure that technical non-compliance with rigid notice clauses will not automatically defect an otherwise valid entitlement.

3

Removal of 'excluded amounts' and 'reference dates'

The Act abolishes the concept of 'excluded amounts' and 'reference dates' from the SOP Act, which were concepts introduced into the Victorian legislation that were unique to Victoria. The amendments are based on the NSW legislation and will broaden recoverable amounts including but not limited to disputed variations, latent condition claims, as well as time-related costs. The amendments are modelled on the NSW security of payment legislation and are designed to simplify payment claim processes in Victoria and remove complexity and unfairness in relation to reference dates.

This is expected to result in increase in the number and value of payment claims and adjudication applications under the SOP Act in Victoria.

4

Expansion of the 'pay when paid' prohibition

The restriction on 'pay when paid' clauses will be extended to prevent clause-dependencies on payments under other contracts. Clauses in a construction contract that make payment to a subcontractor dependent upon the head contractor being paid

5

will be invalidated.

Statutory payment period

The Act imposes a maximum payment period of 20 business days for all progress claims, rendering longer contractual periods of no effect. This is a structural safeguard intended to prevent contractors extending payment terms unreasonably within construction contracts. Under the existing legislation, adjudicators were bound by the longer contractually agreed period imposed upon subcontractors and preventing them from issuing progress claims. This was causing real cash flow problems for subcontractors. As a result of the reforms, payment claims will be able to be served each month and contractually imposed timeframes for payment claims

6

beyond 20 days will be ineffective.

Changes to adjudication and service

In addition to the Act preventing respondents from raising new reasons for withholding payment or security at adjudication, if those reasons were not set out in the payment schedule, the Act protects respondents from being ambushed during the Christmas shutdown period by clarifying the definition of 'business day' to exclude the period from 22 December and 10 January each year. The Act also authorises electronic service of notices.

Retrospective application

Among the more contentious features is the Act's retrospective effect. The main provisions of the amending Act will go into operation on a day or days to be proclaimed, but no later than 1 September 2026. The reforms will apply to pre-existing contracts, unless a payment claim had already been served or adjudication commenced prior to commencement of the relevant provisions.

The retrospective operation of the legislation is expected to generate transitional complexity for ongoing projects.

Planning for the changes

Given the passage of the amending Act through Parliament, construction industry participants now need to carefully consider ongoing projects and contracts that may be affected by the changes, as well as reviewing current practices and redrafting standard-form contracts to take into account the changes that will come into effect by no later than 1 September 2026.

LATE APPLICATION FOR SECURITY FOR COSTS DISMISSED IN BUILDING DISPUTE: *GILRIDGE INVESTMENTS PTY LTD V DIAMOND BUILDERS PTY LTD & ANOR* [2025] VCC 1134

Author: Partner Patrick McGrath and Paralegal Cindy Nguyen

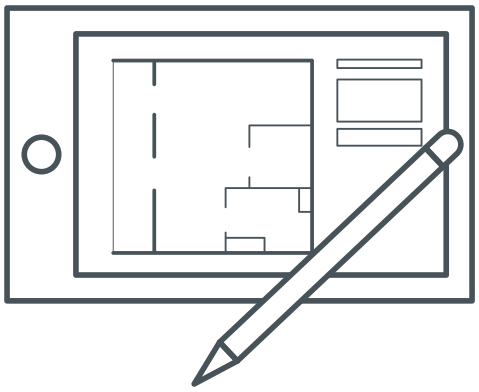
A recent decision in the County Court of Victoria serves as both a warning and guide for those involved in building and construction disputes.

In *Gilridge Investments Pty Ltd v Diamond Builders Pty Ltd* [2025] VCC 1134 (***Gilridge Investments***), Justice Kirton dismissed a builder's late application for security for costs, offering valuable guidance on the timing of such applications, how courts treat litigation initiated following a *Building and Construction Industry Security of Payment Act 2002* (Vic) (**the SOP Act**) award, and the role of financial circumstances in assessing whether security should be ordered.

Key facts

On or about 16 September 2020, Gilridge Investments Pty Ltd (**Gilridge**) entered into a contract with a builder, Diamond Builders Pty Ltd (**Diamond**), whereby Diamond would construct and design a multi-storey apartment complex with a basement carpark for an agreed contract sum of $5,355,547.00 (the **Works**).

During the course of the Works, a number of disputes arose and litigation was commenced between the parties. In two such proceedings, costs orders were made against Gilridge in favour of Diamond, which Gilridge had not paid. Notwithstanding this, the parties' obligations under the Contract were brought to an end on or about 17 November 2022 when Gilridge took the Works out of the hands of Diamond.



- In May 2023 Diamond commenced a proceeding in the County Court (No. CI-23-02167) (**SOP proceeding**) seeking orders under s16(2) of the *Building and Construction Industry (Security of Payment) Act 2002* (Vic) (**SOP Act**).
- On 5 June 2023 Gilridge commenced the subject proceeding in the County Court (No. CI-23-02840) (**Gilridge proceeding**) to enforce contractual rights claimed to have accrued against Diamond and as a defensive action in light of the rights sought to be exercised by Diamond against it in the SOP proceeding.
- On 31 August 2023 Her Honour Judge Burchell held that Diamond was able to satisfy the preconditions to judgment under s16(2) of the SOP Act and was awarded judgment in the amount of $285,577 plus interest and costs in the SOP proceeding.
- On about 29 July 2024 Korda Mentha were appointed Receivers and Managers and Controllers to Gilridge. Diamond was notified of this appointment in July 2024. After the appointment of the Receivers it appears very little steps were undertaken in the Gilridge proceeding.

  The Receivers and Managers continued to manage the Works by engaging another builder to complete the project.
- On 1 April 2025 Diamond issued an application for security for costs in the Gilridge proceeding. The security application was brought by Diamond on the basis of Gilridge's alleged impecuniosity and the risk of being unable to recover costs if it was successful. Although the application occurred almost two years following the commencement of the proceeding, Gilridge claimed that the proceeding had not progressed substantially and was not ready for trial, due to parties not complying with many of the timetabling orders.

Gilridge opposed the application, arguing that Diamond had not established the threshold of impecuniosity, the discretionary factors weighed against an order, and the amount sought was grossly excessive.

Issues before the Court

> In determining whether security should be granted, Justice Kirton first assessed whether the jurisdictional threshold had been established, namely whether Diamond had established that Gilridge would be unable to pay costs if ordered to do so. If the threshold was established, the Court was required to consider whether it should exercise its discretion to grant the security sought.

Decision on the first question

To the jurisdictional question, Her Honour considered the evidence led by Diamond and found that it was insufficient to form the necessary belief that Gilridge would be unable to pay costs if ordered to do so. Therefore, the power to order security was not enlivened and the application for security was dismissed.

Her Honour considered that Diamond was obliged to discharge the burden of establishing a rational basis for their belief that after the Receivers and Managers had fulfilled their primary duty, there would be no surplus available after completion of the works and the sale of the apartments to satisfy an adverse costs order against it. Her Honour considered that Diamond failed to meet that burden, noting that the Court was required to form an opinion about what the financial position of Gilridge would be at the time of judgment and immediately thereafter. The project was ongoing and on completion by the new builder, the Receiver intended to sell the apartments. There was no evidence about what Gilridge's position would be at that time and whether or not there would be a surplus to meet an adverse costs order, at the time when the proceeding was likely to be concluded.

Notwithstanding that Her Honour considered there was insufficient evidence to enliven the power to award security (i.e. the threshold was not reached), Her Honour nevertheless held that she would in any event have refused to make an order for security on discretionary grounds, based on discretionary factors.

These included:

- The delay by Diamond in bringing the application, having become aware of the appointment of Receivers and Managers in July 2024 and not having brought the security application for about 10 months thereafter.
- The fact that the proceeding brought by Gilridge was defensive in nature. Her Honour agreed with Gilridge that the subject proceeding had been initiated in response to the SOP proceeding and that on the available evidence Gilridge's claims were for between $2.5m and $4m which was substantially more than the amount claimed under the SOP Act by Diamond, although the amount claimed was not itself considered to be determinative.
- That Gilridge's financial difficulties had in large part been caused by Diamond's conduct.
- That ordering security would stultify Gilridge's ability to continue the proceeding.

Comment

The mere appointment of Receivers and Managers to Gilridge was not sufficient to establish the threshold for granting security against the builder. It is evident from the decision that courts will examine whether a company under external administration will be able to unable to pay costs ordered against it as and when those costs are likely to be ordered. That may occur substantially into the future, in which case it will be difficult to lead evidence as to what may occur in connection with the project under management, and what the financial outcome and surplus (or deficit) will be. This presents a substantial barrier to establishing the threshold entitlement to security in future cases.

The Court's comments on the discretionary factors are interesting. Any delay in bringing the security application, particularly after becoming aware of the appointment of Receivers and Managers, is likely to weigh against an applicant for security. The observations by the Court about the nature of the Gilridge proceeding being defensive in nature and their claims being stultified by an award of security are also of interest and will need to be factored into any security application under consideration.

However, it appears from the Court record that the decision has been appealed to the Court of Appeal and so we will continue to monitor its progress there.

REFERRALS OF COMPLEX CONSTRUCTION CASES FROM VCAT TO THE COURTS

Author: Partner Patrick McGrath and Paralegal Virginia Stasinopoulos

A change occurring more frequently in complex construction cases is the referral of matters from the Victorian Civil Administrative Tribunal (**VCAT**) to the County and Supreme Courts of Victoria.

The increase in referrals follows on from Justice Woodward's judgment in *Plunkett v Portier* [2024] VCAT 205, which highlights the relevant criteria for when referral of a case to the County or Supreme Court, under section 77 of the *Victorian Civil Administration Tribunal Act 1998*, is most appropriate.

The relevant criteria include:

the amount claimed

The estimated duration of the hearing

the complexity of the parties and issues involved, and

the likelihood of an appeal.

This judgment has already led to changes in the allocation of construction cases within Victoria. Importantly, this judgment demonstrates how, for certain construction cases, VCAT is not considered the most suited forum and a transfer of the case to the County and Supreme Courts may be necessary to ensure adequate case management.

However, whilst the courts may ultimately be more appropriate for the resolution of complex construction cases, there are negative consequences that can place construction industry professionals at risk. This is because in some cases these referrals may cause an increase in both the cost of litigation and the amount of time spent resolving these disputes.

At the time of any proposed transfer, it is also necessary to carefully consider whether the proceeding involves questions of law that only VCAT has jurisdiction to deal with. We are aware of a case currently before the County Court where a decision is pending on this very issue. It is of paramount importance for parties of these disputes to be proactive in establishing which court or tribunal is the most appropriate to hear the case at the earliest convenience having regard not only to the criteria outlined in Portier, but other jurisdiction-specific factors that may impair the ability of the courts to deliver a judgment addressing all of the issues in dispute.

To minimise the risk of increased legal costs and prolonged case management, professionals within the construction industry will need to ensure they are making strategic and proactive decisions within the early stages of their dispute, which aim to protect their long-term case interests.

SPOTLIGHT ON QUEENSLAND

Queensland productivity push: reforms and risks

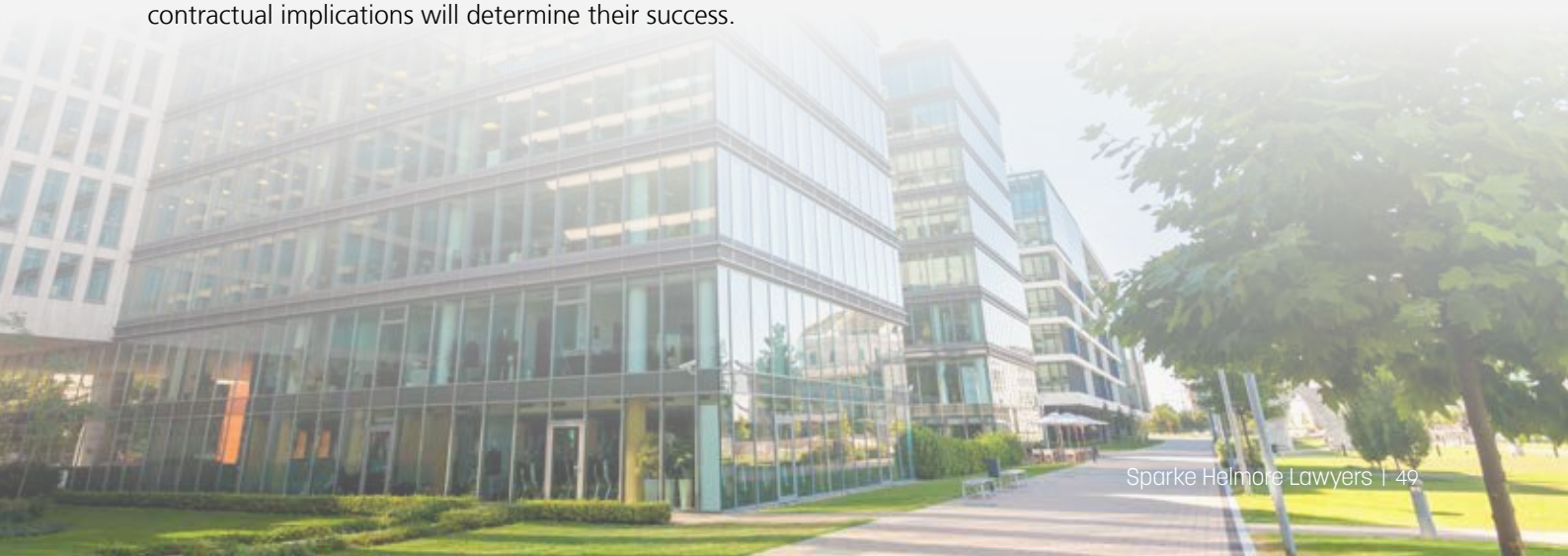
Author: Partner Kiley Hodges and Paralegal Grace Garraway

Queensland's construction industry faces a defining moment as the 2032 Brisbane Olympics approach. Coinciding with the impending Olympics is a wave of reforms aimed at lifting productivity across the sector. These changes come at a time when the industry is already grappling with rising costs, labour shortages and increasingly complex project pipelines. The Queensland Productivity Commission's interim report, the Building Regulation Renovation program, the permanent ban of Best Practice Industry Conditions (BPICs) and a push towards modern methods of construction all form part of this shift.

While the reforms are centred on productivity, they present a changed risk landscape and several legal and contractual implications will determine their success.

Queensland Productivity Commission Interim Report

The Queensland Productivity Commission interim report (**Interim Report**), published 31 July 2025, paints a bleak picture. Construction industry labour productivity is only 5% higher than in 1994-95 despite labour productivity in the market economy increasing by 65% over the same period. The Interim Report identifies a range of productivity barriers in construction, from inefficient procurement processes to overlapping regulation. To address those barriers, the Interim Report makes several preliminary recommendations to improve productivity, with many recommendations involving reviews and overhauls of legislation and regulations. That includes, among other things, easing zoning regulations to increase land supply, a review of the Queensland Government's capital program, improving decision making processes, a call for the permanent removal of BPICs and improving planning and development approval processes.



Building Regulation Renovation Program

The Building Regulation Renovation program is being delivered in stages. Early changes focus on streamlining licensing, simplifying administrative requirements and, for smaller private projects, easing trust account rules. See our notifications of the first three tranches here and here.

These changes may reduce costs and allow smaller builders to focus more on delivery. However, easing financial safeguards such as trust accounts can also reintroduce payment and insolvency risks, particularly for subcontractors and suppliers. Without alternative protections, the industry may see more claims for unpaid work if a contractor fails. This is a reminder that productivity reforms can shift, rather than remove, certain categories of risk.

The suspension of Best Practice Industry Conditions

A year after the November 2024 suspension of BPICs on all new government-funded construction projects was announced, the Queensland Government has announced a new Queensland Procurement Policy commencing 1 January 2026.[10] The Procurement Policy will permanently remove BPICs.

BPICs were originally designed to standardise certain labour and procurement conditions on major government projects. However, they have been highly controversial and heavily criticised for increasing costs, slowing projects down and excluding local contractors. The permanent ban intends to reduce the encumbrance of BPICs on projects. The new Procurement Policy also seeks to boost local business participation by introducing a 30% small and medium enterprise target for work drawn from the

State's $35 billion
annual spend.

In practice, though, the impact of these changes may be limited. Many BPIC-style conditions are already incorporated into enterprise bargaining agreements and private sector procurement frameworks. This means similar requirements will still apply to many projects, regardless of government policy changes. For those tendering or managing contracts, this persistence can affect pricing, resourcing and compliance obligations.

[10] Biggest procurement shake-up in decades backs Queensland businesses in $35 billion spend - Ministerial Media Statements

Modern Methods of Construction

The Queensland Government's Modern Methods of Construction (**MMC**) program is focusing on the efficient delivery of homes across Queensland using modular housing products. The program will largely deliver social and government worker housing in rural and remote areas.

The State's push towards MMC reflects a broader global trend. Off-site manufacturing and modular approaches can improve delivery speed, reduce waste and provide more predictable quality.

The shift, however, changes how risk is distributed. Factory-based manufacturing concentrates responsibility for quality control in one location and introduces transport and assembly risks that traditional builds do not face. Warranty periods, defect liability clauses and insurance coverage must be carefully reviewed to ensure they respond to issues that may arise months or years after components leave the factory. Certification processes also need to adapt, as inspection requirements shift away from site-based assessment towards verifying off-site manufacturing standards.

In the UK, the push for MMC in housing has revealed significant structural and operational challenges that threaten the viability of modular building for large-scale housing delivery. Several high-profile UK modular building factories have fallen into administration or shut down.

Berkeley Modular Ltd shut down its modular housing factory in 2023, despite opening in 2020, citing costs and efficiency impact of regulatory and planning uncertainty on a stable production pipeline. Similarly, Legal & General ceased production of new homes at its modular homes factory in Yorkshire in mid-2023 and is in the process of winding down its entire modular housing division this year. Legal & General's modular business experienced consecutive years of losses from its launch because of an inability to deliver homes at competitive prices, lack of demand, and quality control issues causing delays. Ilke Homes, a housebuilder specialising in modular homes, collapsed into administration in June 2023 with debts of GBP£319m (approximately AUD$664.5m AUD) leaving hundreds of unfinished modular housing projects.

Aside from financial challenges associated with MMC, there are also concerns regarding the safety of such constructions due to gaps in the regulatory framework in relation to modular construction. There is limited research on modular housing as a whole, with a UK report[11] finding standard fire testing is not fit for purpose in volumetric construction and that further research is paramount in understanding how materials behave in modular buildings in the event of a fire.

Looking ahead

> Regardless of which path Queensland pursues to enhance productivity, well-structured contracts and comprehensive insurance policies remain the most reliable safeguards for the construction industry as new risks emerge. They not only serve to mitigate financial and operational risks but also provide clarity and accountability in the face of uncertainty. As productivity strategies evolve, ensuring robust contractual and insurance frameworks will be essential to maintaining trust and stability across the industry.

[11] Volumetric Modular Construction research - GOV.UK

QUEENSLAND CONSTRUCTION RISKS: COPPER THEFT

Author: Partner Kiley Hodges and Paralegal Grace Garraway

Copper theft from construction sites in Queensland has escalated into a significant issue, driven by soaring global copper prices and security vulnerabilities. With incidents increasing, the Queensland construction sector faces significant financial and operational risks. Although the problem is not confined to Queensland, our focus is on the State's specific challenges.

Rising incidence of copper theft

Global copper prices, currently around AUD$15,000 per tonne,[12] continue to incentivise theft across Queensland's construction and infrastructure sites. Energy Queensland recorded a 325% increase in thefts from 2017/18 to 2022/23, costing more than $4.5 million per year.[13] Queensland Police Service (**QPS**) reported 1,507 metal theft incidents in 2022-23,[14] with the trend continuing, and Townsville businesses losing almost $1 million this year.[15]

Thefts typically involve copper wiring, piping, and cabling, which are relatively easy to remove and resell to scrap metal dealers. The high value and portability of copper make it a prime target, while inadequate site security and delayed legislative reforms exacerbate the problem.

The Queensland Government's Transport and Resources Committee (**Committee**) tabled its Parliamentary inquiry into scrap metal theft on 24 November 2023 (**Inquiry**). The QPS submission highlighted the construction industry as a key target, with thieves breaking into construction sites or insiders conducting or facilitating thefts. Energy Queensland's submission pointed to thieves targeting the construction of housing estates, with thefts occurring during installation of electrical infrastructure. The Committee also observed significant safety risks caused by exposed live wiring left by thieves.

[12] The copper market game intensifies in H2. Who will dominate the market amid macro policies, supply-demand pattern, and tariff disruptions? [SMM Special Topic] - Shanghai Metal Market
[13] Energy Queensland Submission to Parliamentary Inquiry into Scrap Metal Theft – September 2023.pdf
[14] Report No. 45, 57th Parliament - Inquiry into scrap metal theft, Table 1.
[15] Copper theft taskforce, Townsville - Townsville
[16] Queensland's Michelton Football Club reported an estimated $100,000 replacement cost after thieves stole three kilometres of copper wiring on 30 August 2023.

Key risks and costs

Financial impact:

- Direct losses from replacing stolen copper can be very costly, with larger projects facing losses up to $100,000.[16]
- Indirect costs include operational disruptions such as project delays, additional labour costs, insurance premium increases or exclusions for copper-related losses.
- Repeated thefts also contribute to claims inflation, as escalating material prices make each theft more expensive than comparable events in prior years.

Legal and liability concerns:

- Losses caused by theft can lead to disputes between owners, developers, contractors and insurers as to the adequacy of measures taken to address vulnerabilities and implementation of site security measures.
- Liability and apportionment may be unclear where contracts and insurances do not address the risks.
- Safety hazards from theft, such as electrocution from exposed wiring, may breach Work Health and Safety (**WHS**) regulations, risking large fines.

Queensland's evolving response

Steps have been taken to address metal theft, though challenges remain:

1. The Inquiry recommended reforms to the Second-hand Dealers and Pawnbrokers Act 2003 including mandatory registration for scrap metal traders, banning cash payments for scrap, and requiring detailed transaction records to trace stolen copper.
2. Queensland Police have intensified efforts through targeted operations like Whiskey Biome, resulting in arrests. They encourage reporting suspicious activity and are working with scrap metal dealers to identify stolen materials.
3. The City of Moreton Bay has pushed for 'no cash for scrap' laws and increased funding for CCTV and license plate recognition systems to deter thieves. Despite these efforts, enforcement remains inconsistent, and legislative delays mean private security measures are critical for the foreseeable future. On 8 July 2025 the City of Moreton Bay called on the State Government to fulfill its election commitment to introduce legislation targeting copper theft.[17]
4. The construction industry is increasingly utilising alternative products to deter thefts. Ergon Energy and Energex are opting to replace stolen copper with stainless steel due to its perceived lesser value.[18] Other copper alternatives include copper-clad aluminium wiring, copper-clad steel wiring, PEX piping, PE-RT piping and PVC piping. Though, these products bring with them a myriad.

In response to our enquiry regarding the Queensland Government's plans to implement recommendations from the Inquiry, the Honourable Deb Frecklington MP, Queensland Attorney-General and Minister for Justice and Minister for Integrity, advised *'policy work in response to this issue is ongoing, and the Crisafulli Government will be carefully considering options to curtail metal theft.'*

[17] Council calls on State to deliver on copper theft legislation - City of Moreton Bay
[18] Copper wire stolen from power poles as providers switch to stainless steel - ABC News

Prevention in other jurisdictions

Other states have adopted or proposed other measures to combat scrap metal theft:

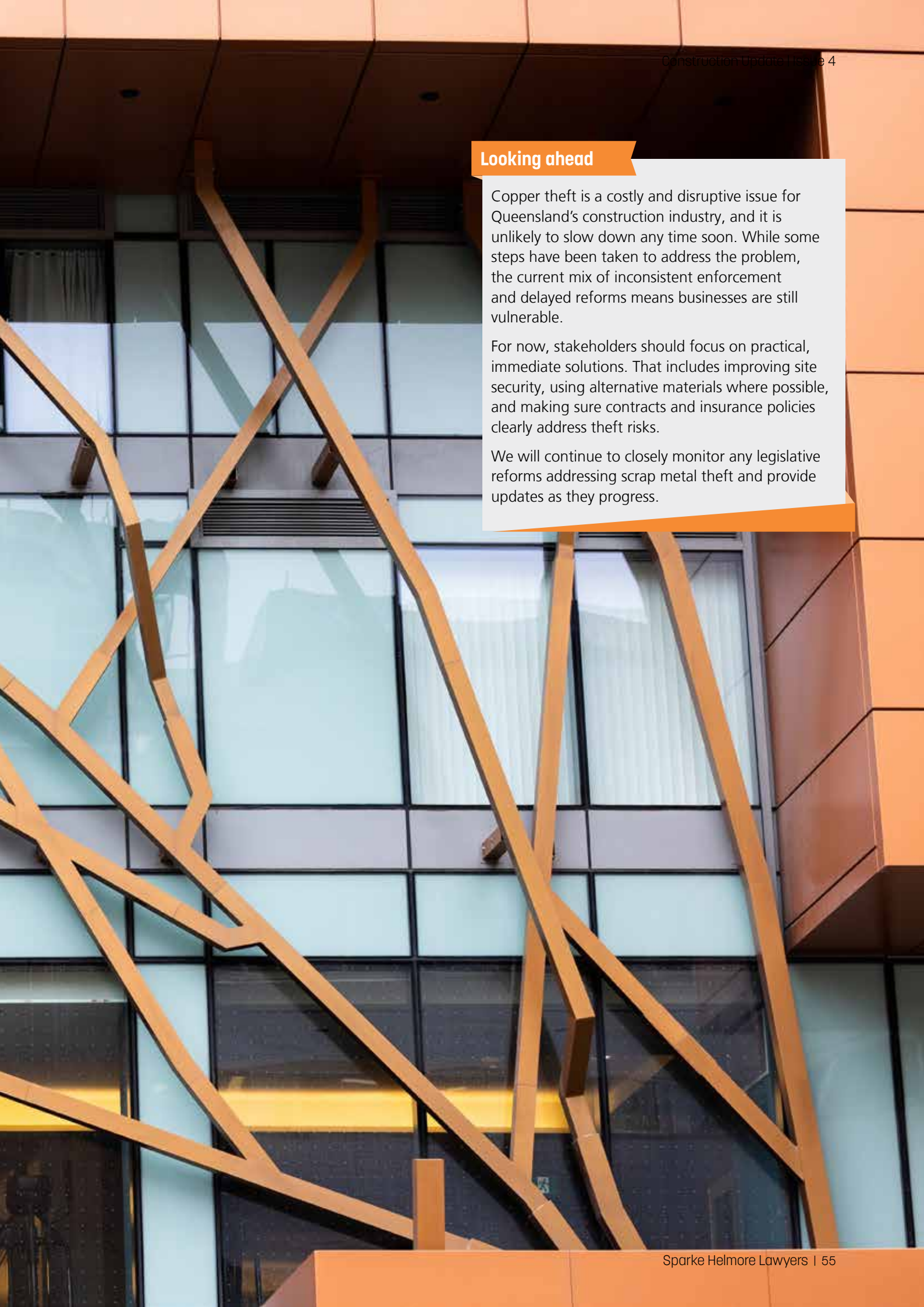
- New South Wales introduced a standalone *Scrap Metal Industry Act 2016* to specifically address the issue of scrap metal theft and included a ban on cash for scrap metal. The Act saw a 30% reduction in scrap metal theft within the first two years of its operation.[19]
- Victoria introduced laws banning cash for scrap metal in 2018.
- South Australia proposed a standalone piece of legislation earlier this year that would include:
  - Clear definitions of scrap metal and scrap metal dealer
  - A requirement for scrap metal dealers to be registered
  - A prohibition on cash, cheques payable to cash or the use of cryptocurrency for transactions of scrap metal
  - A requirement for scrap metal dealers to obtain identification for all transactions and to maintain record of this, and
  - Other measures intended to improve the capability of police to identify and prosecute offenders.

Predictions for the future

The global demand for copper, driven by the energy transition to electric vehicles, renewable energy systems, and battery storage, is projected to double by 2050.[20] This is likely to sustain high copper prices, with forecasts indicating supply could fall 30% short of the amount required by 2035.[21] Consequently, copper theft is expected to remain a persistent threat.

In Queensland, this ongoing demand pressure will likely continue to push up raw material costs, with flow-on effects for construction budgets, insurance payouts, and claims inflation. Rising replacement costs can make each incident substantially more expensive than thefts of similar scale a decade ago.

[19] Copper Theft Discussion Paper
[20] Copper | Department of Natural Resources and Mines, Manufacturing and Regional and Rural Development
[21] International Energy Agency Global Critical Minerals Outlook 2025



Looking ahead

Copper theft is a costly and disruptive issue for Queensland's construction industry, and it is unlikely to slow down any time soon. While some steps have been taken to address the problem, the current mix of inconsistent enforcement and delayed reforms means businesses are still vulnerable.

For now, stakeholders should focus on practical, immediate solutions. That includes improving site security, using alternative materials where possible, and making sure contracts and insurance policies clearly address theft risks.

We will continue to closely monitor any legislative reforms addressing scrap metal theft and provide updates as they progress.

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