Construction Update

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WELCOME

Kiley Hodges

Partner and Head of National Property and Construction Division in the Commercial Insurance team

I am thrilled to present the second issue of the Sparke Helmore Construction Update. This year's publication is now twice the length of the 2022 version and is the result of an extraordinary amount of effort from our insurance and commercial teams across the country, together with two members of Global Insurance Law Connect (GILC), Duncan Cotterill and Beale & Co.

In this issue we reflect on another challenging year for the construction industry in Australia. Insolvencies again featured prominently in 2023, which is reflected in the fact that this topic leads our publication. Also reflective of the current landscape is the introduction of commentary on a range of ESG issues.

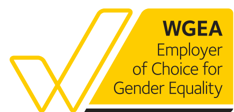
In a series of updates, we consider some of the significant legislative and regulatory developments across Australia. The reform process continues, with some jurisdictions continuing to make great progress, while others are still in the development stage.

The disputes section provides commentary on a selection of decisions relating to defects, expert evidence, contractual interpretation, limitations, insurance issues and security of payment claims.

We also hear from two leading firms: Beale & Co on construction developments in the United Kingdom and Duncan Cotterill on lessons learned from the collapse of CBL in New Zealand.

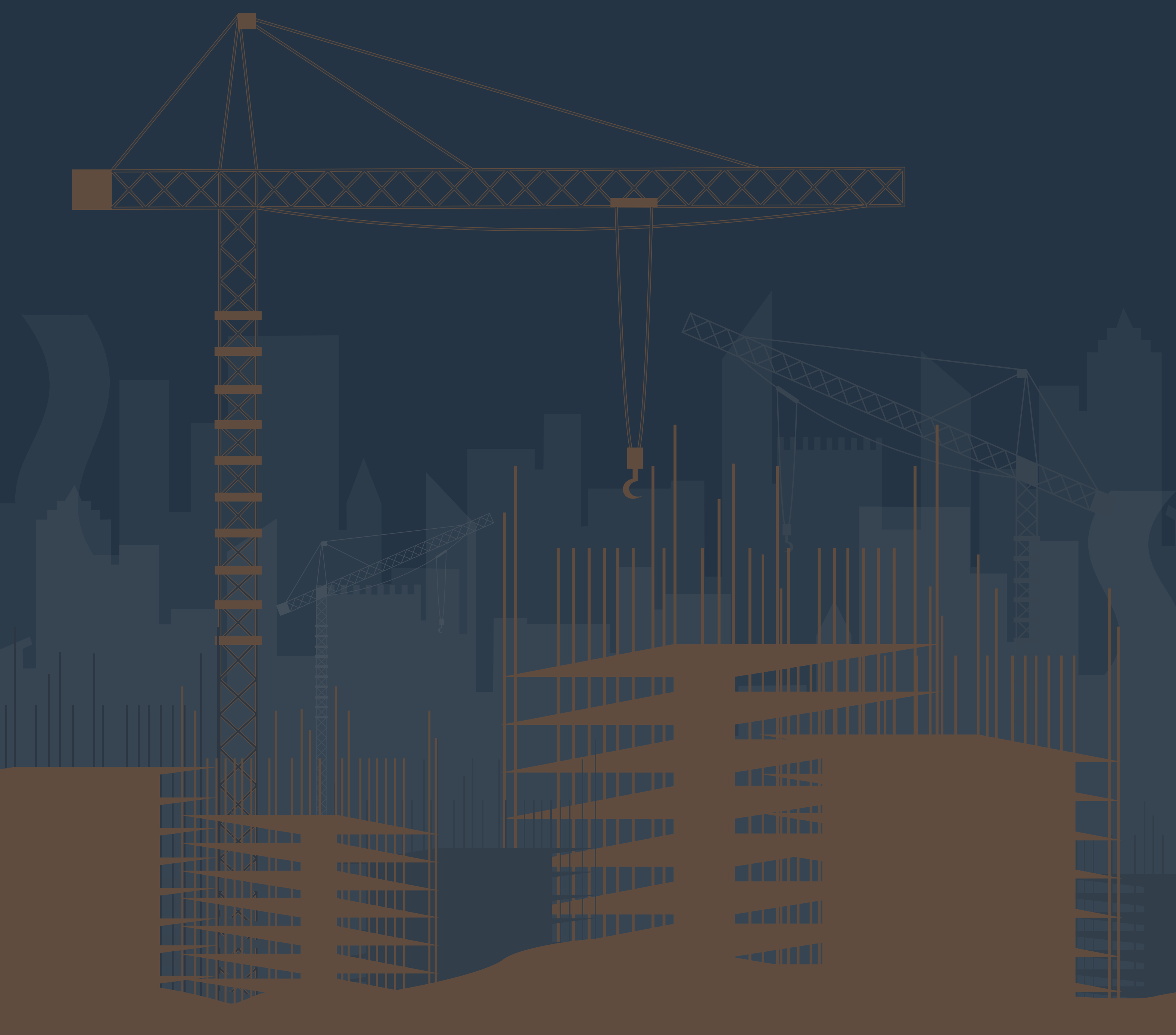
Finally, we have introduced a section on combustible cladding, where we have highlighted two decisions of significance.

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



PART ONE
STATE OF THE INDUSTRY

In Part One, we provide our views on the state of the industry, which is expected to face further challenges in 2024. We discuss the seemingly endless flow of insolvencies and provide a Porter Davis update, summaries of High Court and Federal Court decisions of significance, and comment on whether Australia's restructuring and insolvency laws are up to scratch. Additionally, we have added a new section on ESG, which examines greenwashing and mandatory climate-related financial disclosure, as well as offers insights on emerging green practices and considerations for company directors.



GENERAL COMMENTARY

Author: Partner Kiley Hodges

2023 was another challenging year for the construction industry. Many of the difficulties faced in recent years continued to impact profitability and sustainability. However, this past year saw outcomes across the industry became more varied, with differing experiences across sectors of the industry.

Many initiatives implemented by state governments and the Federal Government directly impacted the industry, including those aimed at boosting economic growth, supporting individuals affected by the collapse of building companies, addressing the housing crisis, strengthening the skilled workforce, and slowing the rate of climate change.

Investment in infrastructure projects also created tension, with competition for labour and materials fuelling higher prices and impacting the feasibility of residential projects.[1] Some governments also paused or cancelled infrastructure projects, leading to uncertainty and redundancies across the industry.

Nevertheless, labour and skills shortages were consistently one of the biggest constraints felt across the industry. Limited reforms were introduced to target these shortages, with many advocating for further change including to skilled migrant visa programs.

Easing of global supply chain pressures improved materials shortages in certain areas. However, access to local sand, cement and plaster remained difficult[2] and construction input costs increased by 30%.[3]

The tail of fixed price contracts continued to impact profitability levels, particularly in the residential sector, and the share of large residential builders with negative cash flows increased. Higher interest rates continued to raise debt-servicing costs and residential builders' overdue trade credit balances to major suppliers increased. The risk of transmission of financial stress from builders to sub-contractors remained elevated.[4]

Liquid reserves continue to be called upon, with the legacy of loss-making projects expected to continue in 2024, with many companies looking to 2025 as the time when the challenges will level out and sustainable profit levels return.

1 Reserve Bank of Australia Statement on Monetary Policy, November 2023
2 Infrastructure Market Capacity 2023 Report, Infrastructure Australia
3 ACIF Forecasts Media Release – November 2023, Australian Construction Industry Forum
4 Reserve Bank of Australia Financial Stability Review, October 2023

INSOLVENCIES UPDATE

Authors: Partner Patrick McGrath
and Senior Associate Mark Beech

In the wake of the COVID-19 pandemic and the increasing financial pressures in the construction industry, Australia has faced an unprecedented collapse of builders. As of November 2023, ASIC data showed 1,063 construction industry businesses nationally have entered external administration for the first time this financial year.[1] This figure is almost triple the amount seen for the 2021 financial year (369 businesses).[2]

The trend of building insolvencies has affected every state and territory in Australia, with builders everywhere falling victim to increasing building costs and delays, material shortages in conjunction with higher inflation, increasing interest rates, and skilled labour shortages. The insolvencies are having downstream effects on sub-contractors and other trades.

Examples of big builders entering administration or liquidation are Porter Davis, affecting 1,700 homes in Victoria and Queensland[3] and Multi-Res Builders Pty Ltd in Tasmania leaving numerous unfinished multi-million-dollar projects.[4] Sydney based plumbing company, Limcora Pty Ltd, is an example of a contractor facing difficulties as it is reportedly owed almost $100,000 from jobs it worked on with Multi-Res.[5]

Public outcry for a national overhaul of the construction industry has attracted significant interest, with homeowners and those in the building industry calling for the government to step in and make builders accountable for their workmanship and actions.[6] The Federal and state governments have continued to consider these issues through the Building Ministers Meetings (**BMM**).

Recent discussions at the BMM have considered the significant economic challenges facing the building industry including supply chain, cost and workforce pressures, which have led to insolvencies in the sector.[7] The BMM noted "*work undertaken by the Commonwealth, state and territory senior officials and the ABCB [Australian Building Codes Board] to identify factors constraining the market at the moment, as well as possible opportunities to bolster capacity and alleviate cost pressures*".[8]

Recent market turbulence and the increase in insolvencies in the broader market has led to significant cases being decided in this area. Two High Court cases - *Metal Manufactures Pty Limited v Morton*[9] and *Bryant v Badenoch Integrated Logging Pty Ltd*[10] – have considered and clarified two provisions of the *Corporations Act 2001* dealing with unfair preferences. In *Copeland in his capacity as liquidator of Skyworkers Pty Limited (in Liquidation) v Murace* [2023] FCA 14, the Federal Court provided guidance as to the particularisation of insolvent trading claims.

1. ASIC, Insolvency Statistics (Report, 28 November 2023) https://asic.gov.au/regulatory-resources/find-a-document/statistics/insolvency-statistics/insolvency-statistics-current/
2. Ibid.
3. https://www.abc.net.au/news/2023-03-31/home-builder-porter-davis-liquidation-lloyd-group-administration/102170136
4. https://www.skynews.com.au/australia-news/tasmania/tasmanian-building-company-multires-builders-pty-ltd-collapses-multimilliondollar-projects-abandoned/news-story/2dd3dc32d66c0370f62224eab893f23c
5. https://www.skynews.com.au/australia-news/tasmania/tasmanian-building-company-multires-builders-pty-ltd-collapses-multimilliondollar-projects-abandoned/news-story/2dd3dc32d66c0370f62224eab893f23c
6. https://www.abc.net.au/news/2023-09-25/families-left-in-limbo-house-build/102880082
7. https://www.industry.gov.au/news/building-ministers-meeting-communique-june-2023
8. Ibid.
9. [2023] HCA 1.
10. [2023] HCA 2.

PORTER DAVIS UPDATE

Author: Partner Patrick McGrath
Acknowledgement: Kalina Sobczak and William Klein

Home building giant Porter Davis went into liquidation in March 2023, unable to cover an estimated shortfall of $20 million.[1]

According to the statutory report produced by the liquidator, Grant Thornton, the business of the Porter Davis Group was impacted by post COVID-19 challenges, labour shortages, productivity issues, price escalation of materials and the availability of materials.[2]

The report found that the Porter Davis Group owed $481.6 million to unsecured creditors.[3]

The collapse resulted in around 1,700 homes in Queensland and Victoria being incomplete and 799 vacant blocks of land undeveloped.[4] In addition, over 560 families were left out of pocket, unable to recover their deposits due to Porter Davis failing to take out builders' warranty insurance at the time of receiving those deposits.[5]

Fortunately for some of the families, an agreement was subsequently entered into to sell their outstanding contracts to Nostra Property Group, which agreed to build up to 375 homes across Melbourne.[6] For other families the news was not so good as it was revealed that the liquidator intended to pursue them over debts owing, so as to enable debts to be paid to creditors. The liquidator reported that unsecured creditors, which numbered over 1000, were unlikely to recover any costs.[7]

In the aftermath of the collapse, the Victorian Government refused to bail out Porter Davis, but announced that families who were unable to recover their deposits due to Porter Davis not having taken out builders' warranty insurance cover, were eligible for a one-off compensation payment of 5% of their deposits.[8] The Government program reportedly cost $15 million and was subsequently extended to include an additional reimbursement package of $13 million for those who were not eligible for the first round compensation payment.[9]

[1] https://porterdavis.com.au/; https://www.grantthornton.com.au/creditors-information/creditors-information-n-t/pdh-group-pty-ltd/

[2] Matthew James Byrnes, Cameron Crichton and Said Jahani, (Statutory Report by Liquidator, PDH Group Pty Ltd & Associated Entities (In Liquidation) 14 June 2023), page 32.

[3] Matthew James Byrnes, Cameron Crichton and Said Jahani, (Statutory Report by Liquidator, PDH Group Pty Ltd & Associated Entities (In Liquidation) 14 June 2023), page 20.

[4] https://www.grantthornton.com.au/news-centre/grant-thornton-partners-appointed-as-liquidators-to-the-porter-davis-homes-group-pdh-group/; see also Matthew James Byrnes, Cameron Crichton and Said Jahani, (Statutory Report by Liquidator, PDH Group Pty Ltd & Associated Entities (In Liquidation) 14 June 2023), page 30.

[5] https://www.premier.vic.gov.au/compensation-payments-help-porter-davis-customers; see also Matthew James Byrnes, Cameron Crichton and Said Jahani, (Statutory Report by Liquidator, PDH Group Pty Ltd & Associated Entities (In Liquidation) 14 June 2023), page 47.

[6] https://www.grantthornton.com.au/news-centre/nostra-homes-to-complete-up-to-375-homes-for-collapsed-home-builder-porter-davis/; see also Matthew James Byrnes, Cameron Crichton and Said Jahani, (Statutory Report by Liquidator, PDH Group Pty Ltd & Associated Entities (In Liquidation) 14 June 2023), page 23.

[7] Matthew James Byrnes, Cameron Crichton and Said Jahani, (Statutory Report by Liquidator, PDH Group Pty Ltd & Associated Entities (In Liquidation) 14 June 2023), pge 21.

[8] https://www.premier.vic.gov.au/compensation-payments-help-porter-davis-customers

[9] https://www.premier.vic.gov.au/support-extended-victims-home-builder-collapses

Despite some support for customers of Porter Davis, builders, contractors, and suppliers working with the company suffered substantial losses as a result of the collapse. Victorian Chief Executive of the Urban Development Institute of Australia, Matthew Kandelaars, highlighted the lack of protection for builders within the industry. He proposed that a way to assist builders would have been to delay the implementation of changes brought about by the *National Construction Code 2022* (**NCC**), which was adopted on 1 May 2023. This recommendation appears to have been taken up with some aspects of the NCC being delayed.

Porter Davis is one of many construction companies to have faced financial hardship in recent times, including the appointment of liquidators and receivers. The long list of construction businesses across Australia encountering financial difficulties includes Probuild[10] , A1A Homes[11] , BCG, Clough, Lloyd Group, Construct Homes, ConDev and Oracle Building Corporation.

Pressure is mounting on the Victorian Government to launch an overhaul of the domestic building insurance regime. In the meantime, the Government has announced plans to increase protections for consumers with uninsured homes.[12]

Porter Davis is one of many construction companies to have faced financial hardship in recent times.

10 See Probuild Remedial Pty Ltd ASIC 'Notice of Appointment as Liquidator' 13 May 2022.

11 See A1 Advanced Constructions Pty Ltd ASIC 'Notice of deemed special resolution to wind up a company', 9 August 2023.

12 https://www.consumer.vic.gov.au/about-us/statement-of-expectations/statement-of-expectations-2023-24

A WIN AND A LOSS FOR LIQUIDATORS IN PURSUING UNFAIR PREFERENCES

Author: Partner Shane Williamson
Acknowledgement: Hugo van Haren

On 8 February 2023, the High Court handed down two important decisions regarding unfair preference claims and in so doing settled, once and for all, the law relating to two provisions in the *Corporations Act 2001* (**Act**) that had been the subject of significant uncertainty. In short, the decisions mean that:

- A creditor cannot rely on a debt owing to it by the company in liquidation to set-off a liquidator's unfair preference claim.
- The peak-indebtedness rule used by liquidators has been abolished. Liquidators had adopted the peak indebtedness rule to select the "highest point" of indebtedness in a running account between the company and a creditor during the relation-back period as the point at which the net reduction indebtedness is to be measured. The quantum of the preference claim is calculated by subtracting the debt owing to the creditor by the company at the time of liquidation from the point of "peak indebtedness".

Statutory set-off not unavailable to creditors as a defence against an unfair preference claim

Pursuant to s 553C of the Act, where there have been mutual debts, claims or dealings between a company in liquidation and a creditor, these are set-off against one another, and only the balance can be claimed by the company or against the company (as the case may be).

What has been unclear over the past decade or so is whether that right of set-off applied to voidable transaction claims available to a liquidator (preference claims, for example) such that a creditor can deduct their claim against the company from their liability to the liquidator.

The High Court decision in *Metal Manufactures Pty Limited v Morton* [2023] HCA 1 (**Metal Manufactures**) settles the position that set-off against a liquidator's unfair preference claim is not permitted and that the authorities over the past decade deciding to the contrary, were wrong.

The question answered by the High Court was:

> *Is statutory set-off, under s 553C(1) of the [Act], available to the [appellant] in this proceeding against the [first respondent's] claim as liquidator for the recovery of an unfair preference under s 588FA of the Act?*

The simple answer was "no".

The High Court agreed with the Full Court of the Federal Court that there was no mutuality between the debt owed by the company to the appellant creditor and the liquidator's claim for an unfair preference. The Court reasoned that:

- At the time of winding up, the liquidator and the company had no claim against the creditor that could be set off. The liquidator's right to pursue an unfair preference claim against the creditor was not a contingent claim at the time of winding up capable of any set-off. Rather, it was an obligation that arose only after liquidation.
- There was no mutuality in the dealings sought to be set-off. The debt owed to the creditor arose out of a dealing between the creditor and the company and the claim for an unfair preference arose as between the liquidator (who acts as an officer of the court, not an agent of the company) and the creditor.

The High Court, having regard for the statutory scheme of liquidation, reasoned at [51] that:

> *It would be a gross distortion of the statutory scheme of liquidation if a creditor could, in effect, avoid the consequences of having received a preferential payment by the happenstance that it was also owed money by the company in liquidation. Such an outcome would diminish the pool of assets available for priority payments and rateable distribution. It would permit a preferred creditor to use each dollar owed to it by the company to set off in full each dollar of liability arising from receipt of an unfair preference.*

Whilst the High Court did not go as far to express that the s 553C set-off provision is not applicable to all voidable transaction and insolvent trading claims in a liquidator's arsenal, the reasoning and principles in Metal Manufacturers would be equally applicable in the context of other forms of voidable transactions such as uncommercial transactions (s 588FB), insolvent transactions (s 588FC) and creditor-defeating dispositions (s 588FDB).

"Peak indebtedness" has no place in a liquidator's calculation of a running account for recovery of an unfair preference claim

The effect of s 588FA(3) of the Act is that, where there was a "continuing business relationship" between a company in liquidation and a creditor such that the level of the company's net indebtedness to the creditor increased and decreased from time to time as a result of a series of transactions forming part of the relationship (such as a trading account), the continuing business relationship is assessed as a whole and only the net preferential effect can be clawed back by a liquidator. The legislative intent of the section is to limit the amount of a liquidator's preference claim in circumstances where a debtor is making payments to a creditor who is supplying goods or services as part of a continuing business relationship.

In the past, liquidators have relied on the peak indebtedness rule to choose the highest point of indebtedness in the running account during the relation-back period and subtracting from that amount, the sum owing on the relation-back day. The peak indebtedness rule, in practice, maximised both the likelihood of proving an unfair preference and the quantum of any unfair preference claim.

The High Court has, in its decision in *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2 (**Badenoch**), made clear that the peak indebtedness rule is no longer available to a liquidator in establishing and quantifying an unfair preference claim under s 588FA of the Act.

The High Court unanimously held that:

1. Section 588FA(3) of the Act does not incorporate the peak indebtedness rule. A liquidator should not be allowed to choose the "start date" of a continuing business relationship. The relevant period is either the period within the six months from when the continuing business relationship started or when the company became insolvent, whichever is later.
2. It is not unusual for companies to trade on a continuing basis for a period but for that relationship to end and another to start again over time or for odd jobs to appear in the interim outside of the continuing relationship. In those circumstances, the two groups of transactions would be separate running accounts rather than one single continuing transaction and any 'odd job' would be excluded from the single transaction. To determine whether a transaction is an integral part of a continuing business relationship, the whole of the evidence of the 'actual business' relationship between the parties must be objectively considered. What the parties intended is a relevant, but not the only, factor.
3. The Full Federal Court was correct in excluding the payments made after the relationship between the company and the creditor ceased.

Without the peak indebtedness rule, the Badenoch decision would likely reduce the quantum recoverable by liquidators in unfair preference claims where there has been a running account.

[1] *Bryant v Badenoch Integrated Logging Pty Ltd* [2023] HCA 2 at [13].

LIQUIDATORS BEWARE! THE NECESSITY OF PROPERLY PARTICULARISING A CLAIM FOR INSOLVENT TRADING

Author: Partner Shane Williamson
Acknowledgement: Tehlyn Murray

The Federal Court decision in *Copeland in his capacity as liquidator of Skyworkers Pty Limited (in Liquidation) v Murace* [2023] FCA 14 (Skyworkers) provided guidance for insolvency practitioners as to the detail required when making an insolvent trading claim.

Background

Mr Murace was the sole director of Skyworkers. The liquidators of Skyworkers filed a claim for insolvent trading against him, claiming that Skyworkers was presumed to be insolvent by reason of a failure to keep financial records and, alternatively, was actually insolvent.

Mr Murace filed an application for summary dismissal and alternatively to strike out the statement of claim on the basis that:

- The statement of claim did not plead the dates on which debts were incurred or how the debts were incurred.
- The allegation that Skyworkers failed to keep financial records was not adequately particularised.
- The allegation of insolvency lacked adequate particulars.

Consideration

Director's duty to prevent insolvent trading

The Court, relevantly, held that:

- Whether evidence is closed or not does not excuse the need to plead essential elements of a cause of action.
- Nor does any inability or failure to identify essential elements of a cause of action relieve a plaintiff from pleading sufficient material facts to establish the necessary elements of a cause of action.
- It is not sufficient to identify only the creditor and the amount of the debts the subject of alleged insolvent trading.
- It is essential for liquidators to identify the dates debts were incurred and how the debts arose.

Particulars of presumed insolvency claim

The Court accepted that proper particulars of the presumed insolvency allegation require identification of the consequences and the particular records whose absence is relied upon to sustain the allegation. As the statement of claim did neither, it was held to be deficient.

Actual insolvency claim

The Court held that, unlike a claim of presumed insolvency, actual insolvency does not require further particularisation. To sustain the allegation requires establishing that the company is unable to pay its debts as and when they fall due. This would not usually require particularisation as to the dates of the alleged insolvency but would be a matter of evidence.

Conclusion

His Honour ordered that the statement of claim be struck out in its entirety and awarded Mr Murace his costs from the commencement of the proceeding, including cost of the application.

The Liquidator was granted leave to re-plead the claim conditional on the payment of Mr Murace's costs.

Key takeaways

Liquidators in preparing a claim for insolvent trading often plead generally or with reference to date ranges in relation to the dates upon which debts were incurred. They often do not plead how the debt arose at all. This case highlights the need to plead, with particularity, the dates upon which debts arose and how they arose.

Similarly, in relation to the presumption of insolvency, it is necessary to identify the particular records whose absence is relied upon to sustain the allegation.

There is a need to plead detailed particulars. If you do not (notwithstanding the obvious difficulties faced by liquidators in doing so) ensure the principles are clear - a statement of claim deficient in those particulars is liable to be struck out.

ARE AUSTRALIA'S RESTRUCTURING AND INSOLVENCY LAWS UP TO SCRATCH?

Author: Partner Nick Christiansen
Acknowledgement: Pooja Kumar

The Parliamentary Joint Committee on Corporations and Financial Services (Committee) began an inquiry into the effectiveness of Australia's corporate insolvency laws in September 2022. Led by Senator Deborah O'Neill, the Committee released its report on 12 July 2023 (Report).

The Report can be accessed here.

The Report from this hallmark review may eventually lead to some of the most far-reaching changes to our insolvency laws since the pioneering Australian Law Reform Commission, Report No. 45 in 1988, commonly referred to as the Harmer Report.

The Report acknowledges that the current corporate insolvency laws do not adequately reflect the present business practices and needs.

The Committee revealed that the current corporate insolvency system is overly complex, difficult to access, and creates unnecessary cost and confusion for both debtors and creditors. Unsecured creditors are often left frustrated by the low returns from insolvency processes. Debtors, often smaller and medium sized businesses, regard the corporate insolvency regime as costly and restructuring opportunities as deficient.

The Committee received 78 submissions and supplementary submissions and conducted six public hearings. The concerns about the corporate insolvency laws raised by the submissions included the complexity of the system, poor engagement by debtors, funding gaps, and a problematic division between corporate and personal insolvency law.

The Committee investigated various matters and concluded that, to address deficiencies of the corporate insolvency regime, there needs to be an immediate independent and comprehensive review of the system as a whole, including personal insolvency. The Committee acknowledged that such a review would require considerable investment of time and resources, however, such an investment is required to ensure that the insolvency system is robust and fit-for-purpose.

The Committee made **28 recommendations** and the full list is available here.

28 recommendations

Key recommendations

Harmonisation of corporate and personal insolvency?

The Committee received submissions suggesting that the distinction between the current corporate and personal insolvency is problematic. The Committee acknowledged that a unification of insolvency law under a single insolvency regulator could deliver many benefits. Given the Committee did not analyse personal insolvency law in depth, it considered that the comprehensive review of a harmonisation system should be a priority.

Voidable transaction and unfair preferences

The Committee received evidence suggesting concerns about unfair preference claims in practice. There was support for reforms that balanced the tension between the competing interests of creditors and liquidators. The Committee acknowledged the importance of the principles of the unfair preference and voidable transaction provisions, which provide tools to ensure that assets are distributed equally amongst the creditors. However, the Committee also accepted that there is evidence indicating that unfair preference provisions may not be providing the outcome they are intended to achieve – overall benefit to the creditors. The Committee considered that the reform to the current unfair preference claims regime is in need of a long-term solution, which can be achieved through a comprehensive review.

ACCC RELEASES GREENWASHING GUIDANCE FOR BUSINESSES

Author: Partner Nick Christiansen

With a global shift towards environmentalism, environmental and sustainability claims made by businesses increasingly influence consumer decisions about products and services. Correspondingly, many businesses make claims about the environmental benefits of their products and services to differentiate themselves from their competitors.

"Greenwashing" – the use of false or misleading statements relating to the environmental benefits of products or services or the environmental credentials of a business – is firmly within the sights of the Australian Competition and Consumer Commission (**ACCC**).

On 14 July 2023, the ACCC issued draft guidance outlining eight good practice principles to assist businesses in complying with their obligations under the Australian Consumer Law (Schedule 2 of *Competition and Consumer Act 2010* (Cth) (**ACL**) in making environmental claims.

In the ACCC's guidance, an environmental claim is defined as any representation made by a business in relation to its environmental impact, including claims that give the impression that the business or its products or services:

- have a neutral or positive impact on the environment
- are less harmful for the environment than alternatives, or
- have specific environmental benefits.

Environmental claims may appear in the form of:

product packaging or labelling

point-of-sale materials

marketing materials

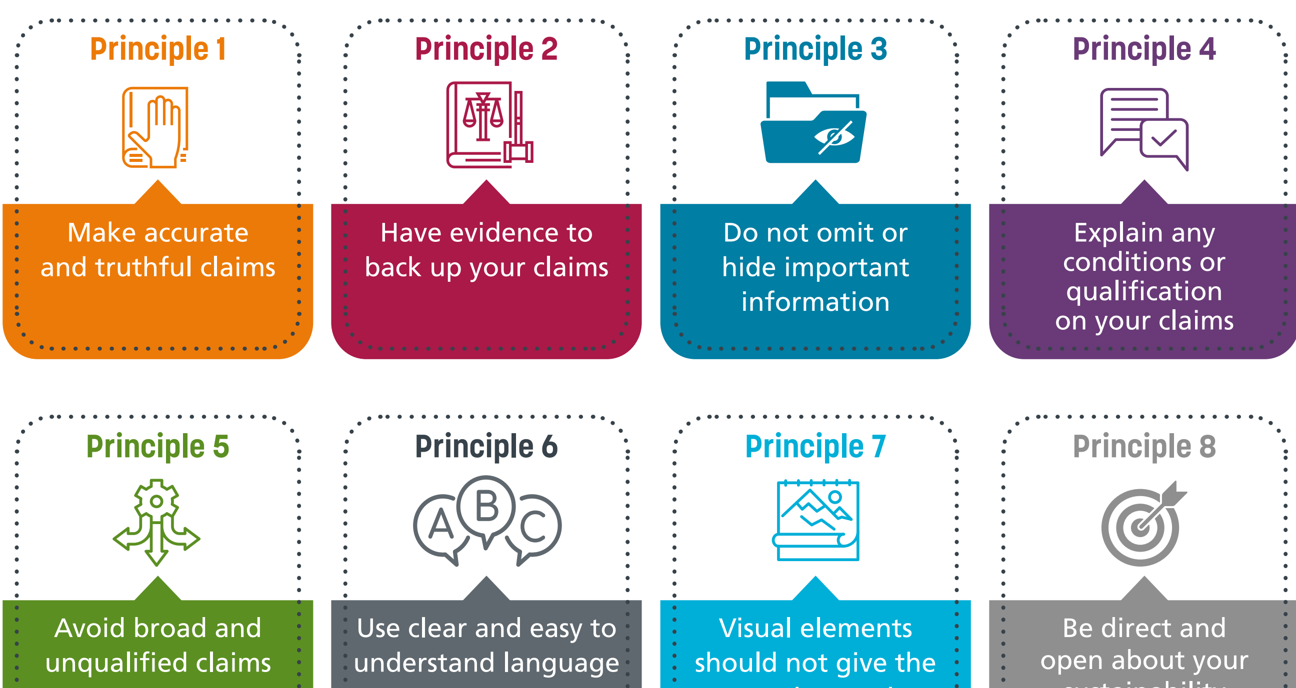
advertising materials (including via online or social media platforms), and

corporate reporting materials.

The ACCC has identified greenwashing as a matter of public concern, undertaking an internet sweep in late 2022 closely examining the environmental and sustainability claims made in relation to products and services across numerous industries. Of the 247 businesses considered by the ACCC in its sweep, 57% raised concerns about greenwashing. It was found that several businesses were either making vague and unqualified claims, exaggerating environmental benefits, or using third-party certification schemes in misleading and confusing ways.

The ACL prohibits conduct that either is misleading or deceptive or is likely to mislead or deceive, and false or misleading representations about goods or services. Contraventions of these prohibitions can carry heavy penalties, and so it is crucial for businesses to understand the risks associated with greenwashing and take appropriate action to avoid contravening the ACL (for further insight into key considerations for directors see 'The rise of ESG: considerations for directors'.

The Guidance Principles include:



Further detail on the Principles is outlined in an article on our website available here.

AUSTRALIAN GOVERNMENT TO ROLL OUT MANDATORY CLIMATE-RELATED FINANCIAL DISCLOSURE FOR ENTITY FINANCIAL REPORTING

Author: Partners John Kehoe and Suzy Cairney
Acknowledgement: Ben Hicks

The Department of the Treasury (**Treasury**) on 27 June 2023 provided a further consultation paper for detailed implementation and sequencing of standardised, internationally aligned requirements for mandatory disclosure of climate-related financial risks in Australia. The announcement comes following the release of the International Sustainability Standards Board (**ISSB**) inaugural global standards - IFRS S1 and IFRS S2 - for climate-related disclosures.

The consultation paper provides:

- The proposed reporting content for climate-related financial disclosures and amendments to the *Corporations Act 2001* (Cth) (**Corporations Act**).
- The details of a separate process for Australian Accounting Standards Board (**AASB**) standards, which is anticipated to align with ISSB standards.
- Which entities will be required to report for climate-related financial disclosure and when through a three-phase road map rollout commencing from 2024-25.
- The proposed role for Assurance Providers for climate-related disclosure and amendments to the Corporations Act and when by, with a separate phasing timeline starting 2024-25.
- The proposed liability and enforcement for companies and directors for climate-related disclosure and amendments under the Corporations Act.

The full article covering these points from the consultation paper is available here.

However, our **key takeaway** is companies should review their operations and assess when they might be captured by this prospective legislation. Smaller companies might consider starting to identify (and perhaps form) the team that will provide the relevant data at the earliest opportunity.

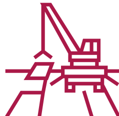
If you are unsure of the regulatory or legislative activities impacting your business or would like assistance in preparing climate-related communications, please reach out to one of our experts.

THE CATALYST FOR GREENER BUILDING?

Author: Partner Suzy Cairney
Acknowledgement: RJ Serrano

The insurance sector stands at a crossroads to revolutionise sustainable building practices and substantially curtail emissions. Buildings emit greenhouse gases throughout their lifecycle, playing a substantial role in climate change.

Approximately
39% of global carbon dioxide emissions
are linked to the built environment, comprising of:



Embodied carbon: from production and transportation of construction materials.

Operational carbon: from energy consumption and activities during the building's lifetime.

There is an urgent need to cut carbon emissions. Practical solutions are available, but they're not being adopted at the scale required to reach net-zero targets. While owners and contractors may be slow to act, key industry players such as insurers may wield greater influence.

Embodied carbon

One effective approach to managing embodied carbon is prioritising sustainable procurement. This includes favouring low-carbon or net-zero construction materials and equipment. For instance, replacing steel components with timber or bamboo without compromising safety, can significantly reduce carbon footprint.

While materials like steel and concrete may be irreplaceable for certain structures, net-zero derivatives of these materials now exist. Low-emission or emission-free construction equipment and vehicles are also readily available. Incorporating such technologies, along with energy-efficient modular workspaces, can further slash emissions. Utilising recycled materials also reduces embodied carbon.

Design and planning phases also play a crucial role in minimising embodied carbon. Architects and engineers can incorporate offsite construction methodologies, such as modular construction, to reduce emissions by nearly 40% compared to traditional methods.

Operational carbon

Embedding sustainable design principles during the design phase—such as energy-efficient lighting, passive HVAC systems, and renewable energy sources—contribute to lower operational carbon emissions. Further, buildings designed with advanced water conservation measures can further decrease operating costs.

Enhancing existing buildings to reduce operational carbon is also possible. Retrofitting old structures is significantly greener than demolishing and constructing new ones. The Sydney Opera House, despite its age, achieved a 6-star Green Star rating, demonstrating that heritage preservation and sustainability can coexist.

The insurer's role

Insurers face new risks with emerging green practices, yet they are now promoting and rewarding sustainable building methods aligned with net-zero goals. By encouraging practices that mitigate climate risks and liabilities, insurers benefit as well. This is the essence of net-zero underwriting, where sustainability aligns with risk management.

From offering lower premiums to supporting clean tech solutions and longer policy terms, insurers are fostering a transition to net-zero practices. These practices have gained momentum in countries like the USA and Canada, and Australia is likely to follow suit. The Insurance Council of Australia's "Climate Change Roadmap" underscores the industry's role in steering the net-zero transition.

Conclusion

The global building industry faces a pivotal moment in the fight against climate change. The imperative to act swiftly, manage carbon emissions, and transition to sustainable practices is clear. While owners and contractors will remain primary drivers, insurers have the power to catalyse this transformation. With practical steps and incentives, they can usher in a greener building era. The question is: who's ready to embrace this challenge and lead the way to a more sustainable future?

THE RISE OF ESG: CONSIDERATIONS FOR DIRECTORS

Author: Partner Suzy Cairney
Acknowledgement: RJ Serrano

Company directors are bound by several duties, both under the general law and the *Corporations Act 2001* (Cth) (**Corporations Act**). These duties involve for example, directors identifying, considering, and ensuring their company properly manages environmental, social and governance (**ESG**) issues.

The rise of ESG

ESG frameworks pose three broad questions for stakeholders:

how does the company treat the environment?

how does the company treat employees, consumers and the community?

how is the company being run?

ESG-related regulation and enforcement activity has significantly expanded across Australia, particularly in relation to reporting and disclosure, and more is coming.

Effective ESG management has become a key business objective for companies. Apart from ESG-related exposures to regulatory, financial and reputational risk, directors must also be mindful of stakeholder expectations. Stakeholders will be keeping a close eye on how companies respond to ESG-related concerns and how the operations of the company potentially contribute to ESG impacts.

A director's role

Companies and directors need to be across the different ESG issues, requirements and expectations that apply to each company (for example, its activities and the industry). Firstly, directors must understand what the impacts of the company's operations on the environment and community are, and the ESG regulatory trends and risks that may impact the company.

Understanding the risks associated with greenwashing

ESG risks for directors include "greenwashing". Greenwashing involves misrepresenting or overstating a company's environmental credentials or positive environmental impacts. It is very easy to do.

With companies now facing pressure from investors and consumers to make net zero commitments and establish and implement energy transition strategies, companies may feel pressured to make environmental claims about their products, services, and operations.

Similarly, market expectations around ESG reporting are increasing, particularly regarding disclosure of climate change-related risks and impacts. Companies may feel pressured to make unsubstantiated environmental claims about their products, services, and operations. Where those claims are false or cannot be substantiated, companies may be penalised under the misleading and deceptive conduct regime of the *Australian Consumer Law* (**ACL**). The ACCC now has more powers and can impose higher penalties.

Directors should be aware unsubstantiated disclosures can give rise to personal liability for their involvement in the company's misleading and deceptive conduct if false or misleading statements are made. Directors should ensure all ESG-related claims and disclosures to the market are clear, accurate, measurable and can be substantiated to avoid "greenwashing" risk and regulatory scrutiny.

Litigation and shareholder activism

Modern shareholders want their companies to reflect their values. Often, they seek to influence corporate decision-making through shareholder activism.

Shareholders now demand responsible business conduct and that directors recognise the financial and operational risks to the company of not adequately responding to ESG issues. For instance, climate-related litigation (mainly due to increasingly urgent calls for responses to climate change) has significantly increased globally.

Companies must keep up to date with trends in shareholder activism and corporate governance to manage shareholder activism. Companies should identify ESG risks, communicate openly with shareholders and specifically address their concerns.

Key takeaways

Companies and directors must recognise and understand the increasing attention being given to ESG issues, and the associated regulatory risks arising from this, and work to address the following priorities:

- strengthen standards of governance and disclosure
- take steps to avoid "greenwashing"
- ensure standards remain high when it comes to ESG compliance, and
- prepare for the broader evolution of ESG and future regulatory enforcement.

PART TWO
LEGISLATIVE & REGULATORY DEVELOPMENTS

In Part Two, we provide an update on legislative and regulatory developments across Australia in 2023. Many of these changes are the result of recommendations made in the 2018 Building Confidence Report of Professor Peter Shergold AC and Ms Bronwyn Weir. The process of reform is at different stages in different jurisdictions, with some being well advanced and others still in the early stages.

Additionally, we have included an article from Beale & Co regarding construction developments in the United Kingdom.

TREASURY LAWS AMENDMENT (MORE COMPETITION, BETTER PRICES) ACT 2022

Author: Partner Kiley Hodges
Acknowledgement: Sophie Little

The *Treasury Laws Amendment (More Competition, Better Prices) Act 2022* (Cth) (**Act**) commenced on 10 November 2023. The Act sets out a new unfair contract terms regime embedded in the *Competition and Consumer Act 2010* (Cth).

The Act broadens the scope of the unfair contract terms regime by expanding the definition of 'small business' to include any business employing under 100 employees **or** having under $10 million annual turnover. This means that more consumers and small businesses are encompassed by the legislation, providing them with better protection against unfair contract terms.

The *Competition and Consumer Act 2010* (Cth) now contains express prohibitions against the proposal, inclusion or reliance upon an unfair contract term. Contravention can result in substantial financial penalties being imposed.

It is expected that many construction contracts, particularly subcontracts, will be impacted by these changes. There is a need for businesses to review and assess the compliance of standard form contracts with the new unfair contracts regime to avoid exposure to penalties.

Further details on the changes can be found in our articles, available here.

NATIONAL CODE 2022 UPDATE

Author: Partner Patrick McGrath
Acknowledgement: Kalina Sobczak and Emily Bertacco

The National Construction Code 2022 (NCC 2022) is a performance-based code which sets the minimum required level for the safety, health, amenity, accessibility, and sustainability of certain buildings.[1] The NCC 2022 introduces new standards and took effect from 1 May 2023.[2]

Major changes

Major changes to the NCC 2022 include new liveable housing requirements for Class 1a Buildings and Class 2 occupancy units.[3] These reforms were adopted in collaboration with advocacy groups to increase accessible housing and support for people with disabilities and their families and carers.[4]

The three volumes of the NCC 2022 have been implemented to enhance consistency in the formatting to increase accessibility and understanding of the standards for consumers.[5] A significant change is the requirements outlined in the NCC 2022 that all plumbing products be lead-free.[6] Some of these changes include transitional provisions for each state with different requirements. For example, in Victoria, from 1 May 2024 provisions regarding 7-star energy efficiency, liveable housing, and condensation mitigation will become mandatory.[7] Given the building industry crisis involving the collapse of many domestic builders, it is unsurprising that there would be some flexibility applied to the implementation of NCC 2022.

1 https://ncc.abcb.gov.au/
2 *National Construction Code 2022* (Cth)
3 Ibid vol 1 pt G7.
4 Liveable Housing Design Guidelines 2017 (Cth), See: https://livablehousingaustralia.org.au/wp-content/uploads/2021/02/SLLHA_GuidelinesJuly2017FINAL4.pdf
5 *National Construction Code 2022* (Cth) vol 1-3; https://abcb.gov.au/news/2023/understanding-ncc-2022
6 Ibid vol 3.
7 https://hia.com.au/resources-and-advice/building-it-right/building-codes/articles/ncc-2022-adoption-dates-and-victorian-variations

Additional changes

Further changes have been made to the NCC 2022 to address the difficulties involved in evacuating minors from multi-level buildings such as early childhood centres and primary schools.[8] Changes to fire safety of external wall requirements have been made including the clarification of concessions relating to combustibility and restrictions on the use of certain cladding products.[9]

New waterproofing provisions apply in relation to wet areas, and weatherproofing provisions provide new solutions for weatherproofing external walls, which include masonry, metal sheeting and concrete.[10] Bathrooms and laundries are now required by the NCC 2022 to have a floor waste installed, requiring a slight slope in the floor to assist in draining the surface water.[11]

Within the NCC 2022 there now can be one single exit as part of a storey in certain circumstances, instead of the previous requirement for two exits.[12]

In relation to plumbing work, the NCC 2022 amendments quantify requirements for water efficiency, sanitary plumbing, drainage pipe sizing, temperature delivery of heated water and pressure limits of drinking water to assist practitioners in meeting performance requirements.[13]

Conclusion

The changes to the NCC 2022 are extensive and represent significant progress in the evolution of building regulations and standards in Australia. The changes implement a performance-based code across building and plumbing work that prioritises safety, health, and sustainability of buildings, such as:

- Inclusion of new liveable housing requirements to improve accessibility and support for individuals with disabilities.
- Transition to lead-free plumbing products and the inclusion of state-specific provisions representing increased environmental responsibility.
- A comprehensive approach to regulating construction standards.

> Once implemented, the NCC 2022 will improve building practices, foster innovation and improve quality of buildings throughout Australia to ensure buildings continue to meet high standards of safety and accessibility.

[8] *National Construction Code 2022* (Cth) vol 1 s D.
[9] Ibid vol 1 C2D10.
[10] Ibid vol 2 F1D6; vol 1 F3V1, F3D1.
[11] Ibid vol 1 pt F2
[12] Ibid vol 1 pt D3.
[13] Ibid vol 3.

AMBITIOUS REFORMS AHEAD FOR THE NSW CONSTRUCTION INDUSTRY: WILL THEY RESTORE PUBLIC CONFIDENCE OR JUST ADD RED TAPE?

Authors: Special Counsel Victoria Huntington
and Senior Associate Aliasgher Karimjee

Why the reforms and why now?

Public confidence in the national construction industry has been undermined in recent years after a series of high-profile incidents involving defective buildings.

In late 2019, the Office of the Building Commissioner (**OBC**) was established to lead a once in a generation reform of the design and building industry in NSW. In 2020, the OBC launched the Construct NSW strategy. Construct NSW focuses on six pillars of industry reform: regulation, ratings, education, contracts, digital tools and data, and research.

The NSW Building Commissioner (**Building Commissioner**) is given significant powers under new and proposed legislative reforms, including investigating misconduct and initiating disciplinary action. These powers are mainly designed to protect homebuyers from defective building work, transform the regulator's approach and support and upskill the industry.

In this update, we focus on the more critical legislative reforms as part of the NSW response.

Building Legislation Amendment Act 2023

The *Building Legislation Amendment Act 2023* (**BLA Act**) passed both houses of Parliament on 21 November 2023 and was assented on 11 December 2023. The BLA Act is an important step in the Construct NSW strategy aimed at restoring public confidence in the building and construction sector by 2025.

The BLA Act amends multiple pieces of legislation.

Briefly, the amendments to the *Home Building Act 1989* (NSW):

- expand the powers of the Commissioner for Fair Trading and NSW Dept of Customer Service (**Secretary**) in relation to contractor licences and authorities in a bid to limit phoenix activity (i.e., when a company is liquidated, wound up or abandoned to avoid paying its debts), including by increasing the period a previous director or manager of a wound up or abandoned company is prevented from holding relevant appointments from three to ten years, and
- empower the Secretary to authorise investigation of residential building work and issue rectification and stop work orders to allow defects to be caught early.

The amendments to the *Building Products (Safety) Act 2017* (NSW):

- impose duties on people who form part of the supply chain for building products, including designers and suppliers, in relation to the safety of building products
- empower the Secretary to issue product safety warnings, product supply bans, product use bans and product recalls, and to apply to the Supreme Court for an order prohibiting a person from supplying building products
- make it an offence to contravene product use bans, and
- make consequential amendments to the *Home Building Act 1989* and the *Design and Building Practitioners Act 2020* by adding further grounds for disciplinary action.

The amendments to the *Strata Schemes Management Act 2015* (NSW) seek to promote the use of Decennial Liability Insurance (taken out by the developer to insure against serious defects for 10 years on a strict liability basis) by providing an exemption to developers who have effected that insurance from the building bond and inspection report requirements under Divisions 2 and 3 of Part 11 of the *Strata Schemes Management Act 2015* (NSW)

The amendments to the *Building Development Certifiers Act 2018* (NSW) and *Design and Building Practitioners Act 2020* (NSW) empower the Secretary to immediately suspend registrations of registered certifiers and practitioners in certain circumstances when a notice to show cause has been served on them.

Building Bill 2022

The *Building Bill 2022* (**Building Bill**) is the next phase of the Construct NSW strategy. When enacted, it is intended to replace the *Home Building Act 1989*, which has been the centrepiece of residential home building regulation in NSW for over 30 years.

The Building Bill will apply to residential and commercial construction, although a distinction between the two will be retained. Of most relevance, the Building Bill will contain amended statutory warranties applying to all residential building work, and under consideration are increased limitation periods for major defects (which will be known as 'serious defects') from six to ten years and for minor defects from two to three years.

The Building Bill was subject to public consultation until 25 November 2022 and is intended to be introduced to Parliament in 2024.

Building Compliance and Enforcement Bill 2022

As its name suggests, the *Building Compliance and Enforcement Bill 2022* (**BCE Bill**) is intended to modernise and consolidate regulatory compliance and enforcement powers.

When enacted, the BCE Bill is intended to replace the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (**RAB Act**), while retaining the powers currently given to the Building Commissioner under the RAB Act to deal with non-compliant developers and serious defects.

Key features include:

- consolidated and strengthened investigation, information gathering, and on-site powers
- remediation actions including undertakings, stop works orders and injunctive powers
- compliance orders and building work rectification order powers
- disciplinary action process for licence holders
- demerit points scheme
- increased penalty offences for serious matters, and
- continuation and expansion of the developer notification scheme and complimentary prohibition order powers.

Under the proposed law, the Building Commissioner would be able to force an owners corporation to fix common property and to issue fines to any owners corporation that is in breach of the Commissioner's orders. Like the Building Bill 2022, the BCE Bill is likely to be introduced to Parliament in 2024.

Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020

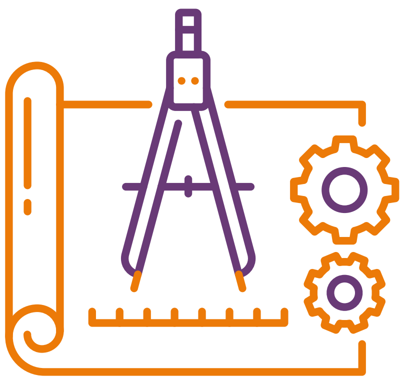
From 3 July 2023, the RAB Act was extended to apply to class 3 and 9c buildings, being buildings like boarding houses, hostels, etc. (class 3) and residential care buildings (class 9c).

The RAB Act commenced on 1 September 2020 in response to calls to better regulate the construction of residential apartment buildings through proactive investigation and rectification of serious defects prior to the issuing of an occupation certificate (thus limiting the number of defective apartments on the market).

Among other things, the RAB Act requires a developer to notify the Dept of Customer Service six months before it intends to apply for an occupation certificate. The notice period is designed to provide the Dept with time to inspect the building prior to an occupation certificate being issued. If a "serious defect" is identified, the Dept has the power to issue an order prohibiting the responsible council or private certifier from issuing an occupation certificate.

The RAB Act also gives the Building Commissioner power to:

- issue stop work orders where the building work could result in significant harm, loss or damage to property
- issue building work rectification orders where the building work has or could result in a serious defect, and
- issue compliance cost notices to pay reasonable costs and expenses incurred in enforcement.



Design and Building Practitioners Act 2020

The *Design and Building Practitioners Act 2020* (and supporting regulations) commenced on 1 July 2021. It has also been extended to apply to newly constructed class 3 and 9c buildings. The Act will apply to the alteration and renovation work for existing class 3 and 9c buildings from 1 July 2024.

Building Legislation Amendment Regulation 2023

The Building Legislation Amendment Regulation 2023 has been made under the following Acts:

a. the *Building and Development Certifiers Act 2018*,

b. the *Design and Building Practitioners Act 2020*,

c. the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

The objects of this regulation are to:

i. amend the *Building and Development Certifiers Regulation 2020* to extend, to 30 June 2024, the period in which a professional indemnity insurance policy may exclude claims relating to building cladding, and

ii. amend the *Design and Building Practitioners Regulation 2021* concerning the registration of building practitioners, except for work carried out for class 2 buildings.

A final word

Only time will tell if all the ambitious legislative reforms become law and end up restoring public confidence in the construction industry, by addressing non-compliant work and poor behaviour by some building professionals.

The reforms mean that building professionals may well need to grapple with unprecedented new duties and increased regulatory powers or potentially face significant penalties.

But the changes are also likely to be a welcome relief for the construction industry and homeowners alike who have been confronted for far too long with substandard building products and defective work, discovered too late.

PROFESSIONAL REGISTRATION – ARCHITECTS REGISTRATION BOARD

Author: Partner Patrick McGrath
Acknowledgement: Kalina Sobczak and Emily Bertacco

Following the release of the Shergold Weir report, *Building Confidence*[1], key issues were identified with the oversight of relevant building practitioners by licensing bodies. Recommendations 1 to 4 dealt with the registration and training of practitioners, including architects, with a focus on achieving a nationally consistent approach.

In Victoria, the *Architects Act 1991* (**Architects Act**) governs practitioner registration with the Architects Registration Board of Victoria (**ARBV**). The Act restricts the use of expressions such as "architectural design services" by persons who are not registered[2], and prescribes requirements for continuing professional development[3] and insurance[4].

The governance of architects, and the composition of the ARBV have, more recently, been the subject of legislative change. On 6 June 2023, the *Building Legislation Amendment Act 2023* (**Amendment Act**) received royal assent, effecting a series of changes to the Architects Act. The Amendment Act has implemented many of the changes proposed in the lapsed 2022 Bill, which had received significant industry criticism, most significantly having regard to proposed changes to the governance of the ARBV itself.

Proposed changes to the *Architect Act 1991*

The *Building, Planning and Heritage Legislation Amendment (Administration and Other Matters) Bill*, introduced in 2022, proposed changes to the governance of the ARBV and the Register of Architects.[5] The ARBV Board was comprised of 10 members, five of whom were required to be registered architects.[6] The proposed changes involved reducing the ARBV Board to nine members, with only three required to have an architecture qualification and none required to be registered architects.[7]

Further proposed changes included:

removing the Board's power to appoint the Chair and placing that power with the Minister[8]

extending the period of the Board and Panel appointments from three to five years[9], and

replacing s 47 and repealing s 48, removing appointment powers held by the Australian Institute of Architects (**Institute**) and various universities.[10]

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[1] *Building Confidence* report of Prof. Peter Shergold and Ms Bronwyn Weir dated February 2018.
[2] *Architects Act 1991* (Vic) s 8.
[3] Ibid, s 15B.
[4] Ibid, s 15A.
[5] *Building, Planning and Heritage Legislation Amendment (Administration and Other Matters) Bill 2022* (Vic).
[6] *Architects Act 1991* (Vic) s 47.
[7] *Building, Planning and Heritage Legislation Amendment (Administration and Other Matters) Bill 2022* (Vic) s 88.
[8] Ibid s 93.
[9] Ibid s 87.
[10] Ibid ss 88, 89.

The proposed amendments sparked concern within the industry[11]. The Institute argued that the proposed changes would result in a reduction of quality and performance to achieve high professional standards, negatively affect consumer protections, and diminish professional standards.[12]

However, when the Amendment Act became law in June 2023 it incorporated many of the amendments that had been the subject of industry criticism.

Section 47 of the Architects Act has been replaced with a new section that provides for:

- At least three, and no more than nine, members of the ARBV Board to be appointed by the Governor in Council on the recommendation of the Minister[13]
- The Minister to ensure that in recommending members to the Board:
  - at least three members are architects and have demonstrated experience in a leadership role within the building industry, and
  - each has the skills, knowledge, and experience in relation to at least one of the following areas – administration of regulatory arrangements for the building industry; public engagement and communications; risk management; public administration or governance; financial, accounting or program management; strategic planning; and architecture.[14]

The amendments also provide for five-year terms (as opposed to three).[15]

The amendments reduced the number of members of the Board who are required to be architects and removed the role of those bodies that previously had input in selecting board members. In light of the changes, it will be interesting to see how the composition of the Board changes over time and whether the Institute's concerns about adverse effects on consumer protection and professional standards will prove to be well-founded.

[11] https://www.architecture.com.au/advocacy-news/keep-registered-architects-on-the-arbv
[12] https://www.architecture.com.au/archives/news_media_articles/great-news-the-arbv-bill-has-not-been-passed
[13] Ibid s 60(1).
[14] Ibid s 60(2).
[15] Ibid s 58.

BUILDING SURVEYORS: PROFESSIONAL REGULATION

Author: Partner Patrick McGrath
Acknowledgement: Kalina Sobczak and Emily Bertacco

The Shergold Weir report, *Building Confidence*[1], reviewed the building regulatory model for building surveyors across Australia, noting that the vast majority of building approvals involve private certification. Recommendation 6 of the report was that each jurisdiction give regulators a broad suite of powers to monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action.

The *Building Legislation Amendment Bill 2023* enhances the regulatory regime in Victoria, consistent with the Shergold Weir recommendation. The Bill recently passed both levels of Victorian State Parliament and received royal assent on 6 June 2023. The new *Building Legislation Amendment Act 2023* (Vic) (**Amendment Act**) has made a number of changes to the *Building Act 1993* (Vic) (**Building Act**).[2]

State Building Surveyor

The State Building Surveyor (**SBS**) will remain operational within the Victorian Building Authority (**VBA**), however, some of its functions will now be governed by the Building Act.

The main functions of the SBS are to be a primary source of technical expertise and to encourage and to support improvements of regulatory oversight and practices to facilitate high quality outcomes.[3]

Other functions include preparing and issuing binding determinations, providing expert advice, advising the Minister, and representing the State.[4] The determinations must be followed by all practitioners and will require building permits to comply with any binding determinations.[5]

[1] *Building Confidence* report of Prof. Peter Shergold and Ms Bronwyn Weir dated February 2018; page 11.
[2] *Building Legislation Amendment Act 2023* (Vic)
[3] Ibid s 14.
[4] Ibid.
[5] Ibid.
[6] Ibid s 25.
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] Ibid.

Building Monitor

A Building Monitor will be appointed by the Governor in Council on recommendation of the Minister. They will hold office for a maximum tenure of five years.[6]

The functions of the Building Monitor are information gathering from persons or bodies, such as the Director of Consumer Affairs (**DCA**) or the Victorian Civil and Administrative Tribunal (**VCAT**) and then issuing reports on their findings to improve the overall building system and practices.[7] They must make recommendations to the Minister on solutions to the issues identified in the report.[8] Once published on the Building Monitor's website they must provide written notice to every person or body that is subject to a recommendation in the report and seek a response within six months as to whether they agree or disagree to the recommendation; and if so, their implementation plan.[9]

Building Practitioner

The Amendment Act has expanded the definition of a Building Practitioner.[10] The definition is expanded to include a building consultant, a building designer, a site supervisor, and a project manager.[11]

Relevant Building Surveyor

The role of the Relevant Building Surveyor (**RBS**) is to provide owners who have applied for a building permit with an information statement.[12] The statement must be issued 10 working days after the building permit is issued and be provided to the owners within the "prescribed form" and in a manner that contains the "prescribed information".[13]

Draft building manual

A draft building manual is to be included with an application for an occupancy permit.[14] The draft building manual will require approval from the RBS by meeting prescribed regulation requirements. Once approved, it must be provided to the owner or Owners Corporations to be kept up to date in accordance with regulations.[15] It will be an offence to knowingly or recklessly include false or misleading information in the drafted or approved building manual.[16]

Information sharing framework

The VBA now has the power to enter an arrangement of sharing information with one or more relevant agencies such as the DCA, the Architects Registration Board of Victoria, a council and VCAT. The intended purpose of this arrangement being to increase efficiency and information gathering powers.

Key takeaways

The amendments to the Building Act implement broad ranging changes to the industry expanding the functions of the SBS and introducing the new role of a Building Monitor with wide information sharing powers. The amendments expand the definition of a Building Practitioner and implement the requirement for building surveyors to provide an owner with an information statement. A number of the changes can be traced back to recommendations in the Shergold Weir report.

[11] Ibid s 31.
[12] Ibid s 32.
[13] Ibid.
[14] Ibid s 36.
[15] Ibid s 38.
[16] Ibid.

TASMANIAN LEGISLATION UPDATE

Author: Partner Patrick McGrath and Senior Associate Mark Beech
Acknowledgement: Emily Bertacco and Zachary Plant

With the increase in builder collapses, the Tasmanian Government has faced calls for legislative reforms due to the limited protection provided to homeowners, particularly when builders become insolvent. In response, the Government has reintroduced the Home Warranty Insurance scheme (**HWI**) through the passage of the *Residential Building (Home Warranty Insurance Amendments) Act 2023* (**Act**). The Act came into effect on 16 October 2023.

The primary purpose of the Act is to amend the *Residential Building Work Contracts and Dispute Resolution Act 2016* (Tas) (**RBWCDR Act**) – Tasmania's primary building contract legislation. It requires building contractors to take out insurance that provides protection to homeowners (both current and future). This gives the homeowners some protection for losses caused by incomplete or defective works in certain circumstances.[1]

The Act's main change to the RBWCDR Act, Part 10A,[2] is the insertion of a section that requires builders to obtain HWI on behalf of the homeowner prior to entering or enforcing a residential building contract. Penalties apply where a building contractor breaches these provisions.[3] The penalties can be a maximum fine of 1,500 penalty units (or $292,500) for corporations and a maximum 500 penalty units (or $97,500) for individuals.

The Act also says that the HWI policy must:

- provide coverage for *all* owners of the premises, regardless of whether the owner has a copy of the certificate of insurance[4]
- remain in force for at least six years from the date of practical completion or, if the contract ends before the completion date, then the warranty period commences from either the date of termination of the contract or the last work performed under that contract[5]

[1] https://www.premier.tas.gov.au/site_resources_2015/additional_releases/home-warranty-insurance-bill-introduced-to-strengthen-protections-for-consumers ; https://www.parliament.tas.gov.au/__data/assets/pdf_file/0020/70913/13_of_2023-Fact-Sheet.pdf
[2] Residential Building (Home Warranty Insurance Amendments) Act 2023 (Tas) s 7.
[3] Residential Building (Home Warranty Insurance Amendments) Act 2023 (Tas) s 7, inserting section 77C into the RBWCDR Act.
[4] Ibid s 7, inserting s 77G(3)(a) into the RBWCDR Act.
[5] Ibid s 7, inserting s 77G(3)(b) into the RBWCDR Act.

- provide a minimum insurance cover of $200,000 or 20% of the building contract price, whichever is the lesser,[6] and
- provide 100% insurance for breaches of statutory warranties or rectifications for defective work.[7]

The implementation of the HWI seeks to:

- comprehensively strengthen the gaps in homeowner protection in Tasmania
- safeguard against builder insolvency by requiring a financial risk assessment to be undertaken by an insurer in relation to cover[8]
- extend the scheme to owner-builders by requiring these builders to obtain HWI.[9]

The Act also introduces additional amendments to other statues under the Tasmanian building regulatory framework to aid protections for homeowners, by:

- providing a definition of insurable work under the RBWCDR Act[10], and
- amending the *Building Act 2016* and *Building Regulations 2016* to ensure that insurance policies in respect of the appropriate building works must be provided to the relevant building surveyor before authorising permit work.[11]

The Act will result in the reinstatement of vital protections that were granted to homeowners through the previous HWI scheme. It provides additional protection in instances of incomplete or defective work and mitigates the recently increasing risks in the building industry.[12] More importantly, the Act brings Tasmania into greater harmony with the rest of Australia in respect to building insurance and safeguards.

[6] Ibid s 7, inserting s 77G(3)(c) into the RBWCDR Act.
[7] Ibid s 7, inserting s 77G(3)(d) into the RBWCDR Act
[8] Fact Sheet to the Residential Building (Home Warranty Insurance Amendments) Bill 2023 https://www.parliament.tas.gov.au/__data/assets/pdf_file/0020/70913/13_of_2023-Fact-Sheet.pdf
[9] Ibid.
[10] Ibid s 7, inserting s 77A into the RBWCDR Act.
[11] Ibid s 10.
[12] https://www.parliament.tas.gov.au/__data/assets/pdf_file/0021/70914/13_of_2023-SRS.pdf

PROPERTY DEVELOPERS BEWARE! ACCREDITATION UNDER NEW REGULATIONS MIGHT BE ON THE HORIZON

Author: Partner Suzy Cairney
Acknowledgement: RJ Serrano

On 13 November 2021, the Developer Review Panel (**Panel**), an independent body appointed under the *Queensland Building and Construction Commission Act 1991* (**QBCC Act**), conducted an 18-month study to assess property developers' role in Queensland's building and construction sector. Developers hold significant influence in the industry, impacting various aspects including project direction, safety, payment security, solvency, and building quality positively or negatively.

On 9 June 2023, the Panel released the "*Setting the tone - The role of developers in Queensland's building and construction industry*". The report encompasses recommendations for a fairer industry, such as establishing an accreditation framework, enhancing education, clarifying responsibilities regarding non-conforming building products, promoting fairness in contracting, and advocating digital tools' use for design and construction records (**Recommendations**). The Queensland Government is reviewing these Recommendations, and if adopted, they could reshape the property development sector.

The Recommendations

1

Recommendation 1 proposes an accreditation and disclosure framework for developers, demanding minimum standards and transparency for contracts involving Project Trust Accounts. The accreditation process involves evaluation of qualifications and fitness of developers by a regulator. The Panel defined a developer as an entity that initiates construction with the main goal of enhancing property value, and where the entity holds an interest in the endeavour.

Developers must meet a "fit and proper" threshold, ensuring financial stability, lack of serious criminal offences, and compliance with QBCC licenses. Successful accreditation results in public registry listing. Developers are then required to adhere to a code of conduct and are subject to accountability mechanisms for compliance. Disclosure obligations to head contractors are also introduced.

Recommendation 2 proposes educational requirements and continuing professional development (**CPD**) for developers, aiming to improve procurement, risk allocation, ethics, and legislative compliance practices. The Panel recommends 2 to 10 CPD hours annually, overseen by industry bodies.

3

Recommendation 3 emphasises including developers in the responsibility chain for non-conforming building products (**NCBPs**). This aim to address the power imbalance between developers and contractors, enhance industry consistency, and potentially improve standards.

4

Recommendation 4 proposes to include developers in the fairness in contracting provisions of the QBCC Act to curb unfair contractual conditions. This would address issues arising from unfair contract terms imposed by developers, which affect contractors' risk exposures.

5

Recommendation 5 emphasises implementing digital tools like Building Information Modelling (**BIM**) for efficient information sharing in construction. While the construction industry has been slow to embrace modern digital tools, BIM can improve efficiency and provide valuable information for decision-making.

Conclusion

The Recommendations address well-known industry issues, yet debates persist regarding their practicality and impact. Implementing these changes could enhance transparency, accountability, and standards, but may also pose complexities and costs. Generally, the public views these Recommendations as a positive move to establish standards in a regulated industry. However, implementing these Recommendations could take months or years.

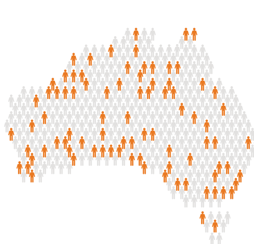
> These Recommendations might hinder development initially due to increased costs and time. Arguably, however, the potential for a safer, fairer, and more transparent industry is worth considering. Overall, these changes could reshape Queensland's building and construction landscape, ensuring long-term benefits for stakeholders.

SILICOSIS UPDATE

Author: Partner Kiley Hodges
Acknowledgment: Adam Tighe

What is silicosis?

Silicosis is a form of damage to lung tissue (scarring or stiffening) caused by exposure to crystalline silica or silica dust. Silica is used in a variety of industries across Australia, including mining, construction, farming, and engineering.



According to the Cancer Council of Australia, in 2011 approximately

587,000

Australian workers were exposed to silica dust in the workplace

and it is estimated that 5,758 of those will develop some form of lung cancer over the course of their life due to that exposure, which is a 1% prevalence rate.

Although there are several products that contain silica dust, engineered stone has received the most attention in recent times due to its detrimental health implications.

Examples of state by state requirements

From 15 November 2022, **Victoria** required all businesses working with engineered stone to be registered. Further, amendments to the State's occupational health and safety regulations implemented a ban on the controlled cutting, grinding, and abrasive polishing of engineered stone.

From 1 May 2023, the *Workplace Health & Safety* ***Queensland*** *– Managing respirable crystalline silica dust exposure in construction and manufacturing of constructions elements - Code of Practice* came into effect, whereby all stakeholders were to comply with the various duties outlined therein, and ensure appropriate:

i. consultation with workers

ii. mechanisms to identify respirable crystalline silica (**RCS**) hazards were implemented

iii. implementation of appropriate controls

iv. cleaning up and maintenance, and

v. air and health monitoring.

The implementation of rule 184A of the *Work Health and Safety (General) Regulations 2022* in **Western Australia** prohibited the cutting, grinding, or abrasive polishing of engineered stone unless appropriate safeguards are in-situ.

As of 1 September 2023, new regulations took effect in **South Australia** whereby it became an offence to direct or allow a worker to process engineered stone without specific control measures in place to minimise the risk of inhalation.

National approach

Safe Work Australia (**SWA**) provided its "Decision Regulation Impact Statement: Prohibition on the use of engineered stone" (**DRIS**) to the Commonwealth, state, and territory Workplace Health and Safety Ministers in August 2023.

The DRIS outlined the following considerations:

- engineered stone workers are dramatically over-represented amongst workers diagnosed with silicosis
- the concept of a "safe" threshold of crystalline silica in engineered stone is not supported by scientific evidence
- importers, manufacturers, suppliers, and businesses working within the engineered stone industry have failed to comply with the existing workplace health and safety legislation
- workers have not taken adequate precautions to ensure their own health and safety, and
- the workplace health and safety regulators have failed to take sufficient compliance and enforcement actions to safeguard against the risks.

SWA recommended that **the use of all engineered stone should be prohibited**.

State and Federal workplace ministers met on 13 December 2023, where they unanimously agreed to impose a ban on the use, supply, and manufacture of engineered stone. The state governments of Queensland, New South Wales, and Victoria have since issued statements whereby they have confirmed their commitment to implementing the ban from 1 July 2024.

WORK HEALTH AND SAFETY (NATIONAL UNIFORM LEGISLATION) AMENDMENT REGULATIONS 2023

Author: Partner Garry Nutt
Acknowledgement: William Edyvane

The Northern Territory has now adopted the model WHS Regulations with respect to 'psychosocial hazards'; these Regulations were amended in part in 2022 based on the findings and recommendations of the 2018 Boland Review of the Model WHS Laws.

The *Work Health and Safety (National Uniform Legislation) Amendment Regulations 2023* will better define 'psychosocial hazard' and 'psychosocial risk', ensuring employers have a positive duty to manage such risks and implement control measures to eliminate or minimise them, so far as is reasonably practicable.

Data collected with respect to workers' compensation claims points to an all-states increase in serious psychological injury claims.

Safe Work Australia's *Comparative Performance Monitoring Report (24th Edition)* shows the proportion of serious claims by mechanism of incident over the past six financial years, where:

'mental stress' accounted for **8.5%** of claims in 2020-21, but

'mental stress' claims increased by 63% during the same six year reference period.

We should point out, as was noted in the Actuarial review of the Northern Territory workers compensation scheme as of 30 June 2022 and commissioned for NT WorkSafe, that Safe Work Australia's report shows that the NT has a lower presentation of primary psychological injury claims than most other states. Noting further and we think importantly, this data does not always account for sequela psychological injuries, which it is generally agreed are harder to accurately identify.

WORK HEALTH AND SAFETY (NATIONAL UNIFORM LEGISLATION) AMENDMENT ACT 2019 (NT) INTRODUCED THE OFFENCE OF INDUSTRIAL MANSLAUGHTER

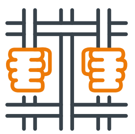
Author: Partner Garry Nutt
Acknowledgement: William Edyvane

As the Safe Work Australia's *Key Work Health and Safety Statistics, Australia 2022* report points out, the NT in 2021 averaged 3.1 work related fatalities per 100,000 workers. That is almost double of any other state or territory in the country.

Commencing 1 February 2020, the *Work Health and Safety (National Uniform Legislation) Amendment Act 2019* (NT) introduced the offence of industrial manslaughter.

However, the first prosecution of this offence, with Kalidonis NT Pty Ltd and its director Theofilis Kalidonis has failed and the charge was dropped to great surprise from some commentators.

The offence carried with it a maximum penalty of:



the possibility of
life imprisonment
for an individual, or

65,000 penalty units
(about **$11,440,000** this FY)
for a company.

Kalidonis NT Pty Ltd and Mr Kalidonis as director of the company, is however still charged with failing to comply with a health and safety duty. This offence carries with it a maximum penalty of $300,000 for an individual and $1.5 million for a company.

A guilty plea was recently entered into with respect to this offence in the matter of the *Work Health Authority v Whittens Pty Ltd*; the company was fined $425,000.

It is a timely reminder about the duties and obligations that employers, particularly in the construction space, have to their employees. This is evident in the increasing mechanisms that are being put in place to fine and where necessary prosecute instances of breaching/offending under the *Work Health and Safety (National Uniform Legislation) Act*.

BEALE&CO

CONSTRUCTION DEVELOPMENTS IN THE UNITED KINGDOM

Author: Nathan Modell, Partner, Beale & Company Solicitors LLP
Acknowledgement: Alice Eager, Solicitor, Beale & Company Solicitors LLP

Building safety continues to be top of the construction agenda in the UK following the tragic Grenfell Tower fire in 2017. While the final report of the Grenfell Inquiry is awaited, the *Building Safety Act 2022* (BSA) came into force in 2022 making wholesale changes to building safety.

The BSA's purpose is to "*give residents and homeowners more rights, powers and protections – making homes across the country safer*" aimed at holding the construction industry to account and establishing better construction practices and competences.

The changes undoubtedly increase the exposure and potential liability of those involved in the construction industry. As a direct result, the insurance industry, and especially those providing professional indemnity cover, have taken a keen interest in developments, resulting in reduced cover, fire safety policy exclusions, and higher premiums.

Major changes under the *Building Safety Act 2022*

Given the broad purpose of the BSA is to make homes safer, its provisions impact those involved in design, construction and maintenance of residential buildings, particularly in relation to "higher-risk buildings" (those over 18m / seven storeys high with at least two residential units).

The BSA imposes wide-ranging regulatory responsibilities on "dutyholders" (during the construction phase) and "accountable persons" (during the occupation stage – the original proposed role of "building safety manager" having been scrapped). A large part of the new responsibilities relates to building information, which must be maintained and managed (a so called "golden thread") throughout the life of a higher-risk building.

The BSA brings in new planning Gateways 2 (pre-construction) and 3 (pre-occupation) as stop/go points to ensure that building safety regulatory requirements are being met for higher-risk buildings.

The regulator of the higher-risk buildings regime will be the newly created Building Safety Regulator (**BSR**), part of the Health and Safety Executive. The monumental change in relation to regulation in this area cannot be underestimated, in both extent and enforceability. Every lifecycle phase of higher-risk buildings will be closely monitored and subject to BSR approval.

The reform is not limited to those designing and constructing the buildings, with the BSA holding liable the manufacturers, marketers and suppliers of construction products that are used in the construction of a building, where it is found to be unfit for habitation.

The BSA provides the BSR with wide-ranging enforcement powers. Those in contravention of building regulations may be liable to up to two years' imprisonment, a fine, or both. The BSA's amendments to the *Building Act 1984* make it crystal clear that individuals responsible for any neglect will not be able to hide behind the corporate veil and face personal liability. In addition, the requirement to correct work found to be non-compliant with building regulations is extended from one year to 10 years.

Increased training/competence is mandated and 'Approved Inspectors' and local authority building inspectors are now regulated by the BSR.

Changes to the *Defective Premises Act 1972*

One of the most controversial changes resulting from the BSA is in respect of the amendments to the *Defective Premises Act 1972* (**DPA**). The DPA covers landlords' and builders' liability for poorly constructed and poorly maintained buildings which are deemed unfit for human habitation.

Under the amendments, the limitation period for bringing new claims is extended from six to 15 years and where work was completed prior to the amendments coming into force, a 30-year retrospective limitation period applies.

Claims against construction product manufacturers are also now possible, where the use of defective construction products leads to the building being uninhabitable, the limitation period will be 15 years.

Warranties on new build homes are now required to provide cover for 15 years.

With the increase in potential liability, claims will undoubtedly follow against those involved in the construction of dwellings. Indeed, in the recent decision in *URS Corporation Limited v BDW Trading Limited [2023] EWCA Civ 772*, the first Court of Appeal decision relating to claims under the DPA since enactment of the BSA, found that in certain circumstances developers are owed a duty under the DPA, as well as owners and occupiers. This may result in increased claims against contractors and consultants by developers under the DPA.

Building Liability Orders and Information Orders

The BSA has paved the way for Building Liability Orders (**BLOs**). These are intended to address the common practice whereby developers create subsidiary or special purposes vehicle companies for the sole purpose of carrying out particular development project. Following the project's conclusion, any remaining assets are transferred out and the company is wound up or dissolved. While commercially convenient, this often leads to the situation where the company which undertook a development has been dissolved or holds limited assets of value when issues arise.

BLOs extend the specific liability of one corporate entity to an associated company/companies, making them jointly and severally liable where there is a "relevant liability". Currently a relevant liability is one incurred under the DPA or resulting from a "building safety risk" and further ground, pursuant to s 38 of the *Building Act 1984*, is still to come into force.

The assessment of whether a corporate entity is associated with another will depend on the facts of the case and specific corporate structure in place. Broadly, there will be an association if one controls the other, or a common third-party controls them both. Such association may have occurred any time from when the building works started to when the order is made and has the potential to capture a wide pool of associated companies.

In addition to BLOs, the BSA introduces the right for a claimant to apply for an Information Order. If granted, this Order requires a specific company to give specified information or documents related to its associated companies. This presents a powerful tool for potential claimants to use in order to determine whether there is merit in applying for a BLO and/or which company/companies a BLO application should be targeted at. To obtain an Information Order, the applicant will need to show that it requires the specified information or documents in order to enable it to consider whether to apply for a BLO.

In principle, these Orders could result in a significant broadening of the potential liability exposure for past and future projects – as it opens up the possibility for associated companies, who were not directly involved in the project, to be held jointly and severally liable. This effectively pierces the corporate veil which group company structures have historically relied upon. We expect to see a surge of applications for BLOs / Information Orders in 2023 and beyond. We anticipate there will be much legal debate regarding what factors will come into play when the courts consider if a BLO is 'just and equitable'.

Related Government schemes

Building Safety Pledge Scheme

The UK Government has also created the Building Safety Pledge scheme (**Developer Pledge**) in which 53 of the UK's largest housebuilders have been invited to sign legally binding contracts to remediate all necessary life-critical fire-safety work on buildings above 11m, which they had a role in developing or refurbishing over the past 30 years. The legislation gives powers to the Government to refuse planning permission or building control approval to those developers that fail to participate in the scheme. For "orphan buildings" where a responsible developer cannot be found, the BSA allows the government to set up an extended building safety levy, which will be charged on all new residential buildings that require building control.

Cladding Safety Scheme

The Cladding Safety Scheme (**CSS**) is a fund addressing life safety risks associated with cladding on residential buildings over 11 metres in height (or 11-18 metres in height if the building is in London), not specifically deemed as higher risk under the BSA.

The CSS will support applications where the applicant cannot afford to carry out works themselves, or feel it is not their responsibility to do so. The applicant must prove they are legally responsible for the external repair and maintenance of the building.

The CSS only applies to wholly residential or mixed use residential/commercial buildings over 11 metres in height, whether they are in the private or social sector.

The CSS sits alongside the Developer Pledge. The CSS will not fund applications for buildings where a developer has agreed to fund works in accordance with the Developer Pledge. Where the Developer Pledge does not apply, funding can be sought from the CSS. However, applicants are expected to take reasonable steps to pursue developers and other parties (for example, insurers, warranty providers, contractors, and other professionals involved in the original construction). This is not a new requirement, as it has applied to all previous funds.

The applicants must obtain a Fire Risk Appraisal of External Walls (**FRAEW**) carried out in the manner specified by the CSS. The CSS will only fund works recommended in the FRAEW to address life safety fire risks associated with cladding or the external wall system. Recommendations in an FRAEW intended for other purposes (for example, to ensure compliance with Building Regulations, address general building defects, improve EWS ratings or maintenance works) will not be funded. The CSS will also not fund interim measures such as waking watch.

In many ways, the key features of the CSS replicate those set out in other funding mechanisms, such as the Building Safety Fund (which applied to buildings over 18 metres).

However, the fact that the CSS will not fund works beyond those recommended in the (mandatory) FRAEW to address life safety fire risks associated with cladding or the external wall system is of note. This strongly suggests that a proportionate and risk-based approach to any works is to be preferred. Put another way, the focus appears to be on works identified as necessary to ensure the health and safety of residents, rather than strict compliance with Building Regulations or defects in the original construction.

PART THREE
DISPUTES

Australian courts hear an immense number of cases relating to construction disputes each year. Our selection of decisions, summarised in Part Three, covers a broad spectrum of issues including:

- the validity of excise duties
- the *Design and Building Practitioners Act 2020* (NSW)
- defects
- expert evidence
- contractual interpretation
- limitations
- insurance coverage, and
- security of payments.

HIGH COURT REVISITS EXCISE DUTY – *VANDERSTOCK v THE STATE OF VICTORIA*

Author: Partner Peter Charteris

On 18 October 2023 the High Court in a 4/3 decision (*Vanderstock v The State of Victoria* [2023] HCA 30) (Vanderstock) held that the *Victorian Zero and Low Emissions Vehicle Distance-based Charge Act 2021* (ZLEV Act) was invalid as it imposed a duty of excise within the meaning of s 90 of the Constitution. Only the Commonwealth can impose duties of customs and excise.

In so holding the majority of the High Court in a joint decision of Kiefel, CJ, Gageler and Gleeson JJ and separate judgment of Jagot J held that a tax on goods imposed at the stage of consumption was an excise. The decision in *Dickenson's Arcade Pty Limited v Tasmania* [1974] 130 CLR 177 that a tax on goods imposed at the stage of consumption was not an excise, was overruled.

It strongly worded dissents the three dissenting judges in different ways severely criticised this change in approach.

The approach now is that a tax will be an excise where the tax has a close relationship to production or manufacture, sale, distribution, or consumption of goods. At para 147 of the joint judgment, it is noted that the tax must bear a close relation to the production, manufacture, sale distribution or consumption of goods. This is to be contrasted with taxes for the privilege of engaging in a relevant activity or are imposed as an element of a scheme for the regulation of the relevant activity in the public interest.

The second element (para 148-9) is that the tax must be of such a nature as to affect the goods as the subjects of manufacture or production or as articles of commerce. Relevant considerations are the nature and general tendency of the tax, to go into the cost of the goods, in the manufacture or production or movement of the goods into consumption. The form and content of the legislation imposing the tax will be relevant.

ZLEV Act

This Act imposed a usage charge for electric vehicles using specified roads. The fact that if you used the vehicle other than on a specified road, such as on a farm, the tax was not payable did not stop the tax being an excise.

Possible impact on other state taxes

State stamp duties for certain transactions generally deem certain goods to be part of the land so that their value is included in the value of land and tax levied on the increased value. The fact the goods are deemed to be part of the land would not alter their characteristics as goods. It would not be up to the states to determine whether or not something is a good and thereby bypass excise duty.

In the case of acquisition of goods subject to duty, the acquirer of the property bears the tax. In that sense it should be fairly easy to establish that the price the buyer is willing to pay for those goods is reduced by reference to the stamp duty payable on the value. The difficult question will be whether this is sufficient, as it is only this particular type of transaction on goods that bears a cost for the tax.

When the buyer sells those goods to the next person in the supply chain, the price will not be impacted at all by the tax that the buyer has paid in acquiring the goods under the dutiable transaction. It is not a tax on a step in bringing the goods into production or consumption; it is a tax on the goods unique to the particular type of transaction in those goods.

In those states and territories that still levy stamp duty on the sale of chattels, the distinction between trading stock and other chattels—no doubt motivated by in fact the trading stock has not gone into consumption—is no longer a relevant distinction.

Landholder duty that taxes by reference to goods is likely to be too indirect as its taxes the interest acquired in the legal entity by reference to the value of goods (as well as land) that the entity owns.

Mineral royalties are unlikely to be affected where it is imposed by reference to the right to sever the mineral from the soil, as minerals are not goods until they are severed from the soil.

Motor vehicle registration fees, which are necessary to have the right to use the motor vehicle on public roads, are unlikely to be affected.

Duties levied on acquiring first registration or on transfer of registration of a motor vehicle may be more problematic, as they are determined by value of the motor vehicle and clearly affect the price. Following on the ZLEV Act approach to characterisation as an excise, the fact that such fees are not payable if the motor vehicle is not registered for road use, no longer seems to be relevant.

Conclusion

The states will be constrained in the user charges they can impose on use of goods.

There will be some narrowing in the scope of activity on which states can levy taxes, however, land taxes, stamp duties on land and intangibles will remain. Whether the states can continue to levy stamp duty on goods remains to be seen.

Challenging state taxes will not be for the fainthearted. The Vanderstock case ran for three days and every state's and territory's Solicitor General appeared.

ROBERTS V GOODWIN STREET DEVELOPMENTS PTY LTD [2023] NSWCA 5

Authors: Partner Dino Liistro and
Senior Associate Aliasgher Karimjee

This year, a key appeal was determined in the NSW Court of Appeal in *Roberts v Goodwin Street Developments Pty Ltd* [2023] NSWCA 5. The central issue determined by the Court as it related to the *Design and Building Practitioners Act 2020* (NSW) (DBP) was the type of buildings to which the statutory duty of care contained in Part 4 (s 37) of the DBP applied.

In short, the Court held that the duty of care contained in s 37 of the DBP applied in respect of work undertaken on a broad category of buildings, extending beyond just Class 2 buildings to which the other parts of the DBP apply (when referring to "building work"). The Court considered the history of the Bill and the comments made by Ministers of Parliament during the course of amendments, which showed a clear intention of Parliament that the duty of care would have broad coverage and that is the purpose to which the Court gave effect (see [195] to [210], in particular [200], [201], [205] and [208]).

Facts

Goodwin Street Developments Pty Ltd (**Goodwin**) engaged DSD Builders Pty Ltd operated by Daniel Roberts (the Appellant, **Mr Roberts**) under a contract entered into on 10 July 2017 for the construction of student accommodation in Jesmond, NSW. It was accepted that for all intents and purposes, Mr Roberts was the "builder". As it relates to the DBP, Goodwin brought a claim against Mr Roberts that he owed a statutory duty of care under s 37 of the DBP and was liable to rectify a list of defects in the construction work.

Goodwin succeeded at first instance on the basis that the definition of "building work" contained in s 4(1) of the DBP, which (by way of the regulations) limited application to Class 2 buildings only, did not apply to Part 4 of the DBP in which the statutory duty under s 37 was contained. If the duty under s 37 was limited in this way, it would not apply to the subject matter of this case that involved the construction of "boarding houses", which was not a Class 2 building. Instead, it was held that Part 4 applied to "buildings" as it was defined in s 36(1) of the DBP by reference to the meaning of that term contained in the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA**), which included boarding houses, and that the definition in s 4(1) had no role to play. This was discussed in our Construction Update dated 19 December 2022.

Mr Roberts brought an appeal in the NSW Court of Appeal. As it relates to the DBP, Mr Roberts argued that the trial judge had misconstrued the DBP in finding that the s 37 duty applied to the construction of boarding houses.

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

Finding on appeal

The Court of Appeal agreed that the statutory duty of care contained in s 37 of the DBP applied to the construction of boarding houses, albeit on a different basis to that held by the trial judge.

The Court drew a distinction between the type of work being undertaken and what type of buildings that work is undertaken on. "Building work" is defined in s 4(1) of the DBP by reference to both these issues: the type of **work** undertaken being construction of a building, making of alterations or additions to a building, and the repair, renovation or protective treatment of a building, and the type of **building** that the work is undertaken on – for the purposes of s 4(1), this was prescribed by regulation to mean Class 2 buildings. It was accepted that a "boarding house" was not a Class 2 building.

The Court held that the definition in s 4(1) applied to Part 4 as it related to the first topic – i.e. the type of **work** undertaken, but it did not apply in relation to the type of **building** upon which it was undertaken. The definition of "building" contained in s 36(1) (which defined it broadly by reference to the meaning of that term in the EPA) prevailed over the type of building prescribed in the regulation for the purposes of s. 4(1) of the DBP – i.e., Class 2 buildings.

Implications

What this means is that the statutory duty of care under s 37 of the DBP applies to anyone who carries out construction work on any building, not just Class 2 buildings. The duty is to exercise reasonable care to avoid economic loss caused by defects in or related to a building for which the work is done and arising from the construction work. Importantly, the duty is owed to both current and subsequent owners of the land and has retrospective effect in respect of economic loss that first became apparent within 10 years prior to the commencement of s 37 (11 June 2020).

In light of the clarified meaning of "building", more owners may now have a right to claim damages for breach of the statutory duty thereby increasing exposure for those in the industry. It remains to be seen whether this will impact the number of claims made and is a matter of 'watch this space' for insurers.

...clarified meaning of "building", more owners may now have a right to claim damages for breach of the statutory duty...

OWNERS - STRATA PLAN NO 84674 v PAFBURN PTY LTD [2023] NSWCA 301

Authors: Partner Dino Liistro and Senior Associate Aliasgher Karimjee

On 13 December 2023, the Owners - Strata Plan No 84674 successfully appealed against a decision of Rees J of the Supreme Court of NSW (*The Owners - Strata Plan No 84674 v Pafburn Pty Ltd [2023]* NSWSC 116). The appeal was in relation to the application of the proportionate liability provisions in Part 4 of the *Civil Liability Act 2002* (NSW) (**CLA**) to a claim for breach of the duty of care contained in s 37 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP**).

In short, the Court (Basten AJA, Adamson JA and Ward P agreeing) held that the combined effect of ss 5Q and 39(a) of the CLA and s 39 of the DBP (which says that the duty under s 37 of the DBP cannot be delegated) meant that a defendant could not rely on the proportionate liability provisions of the CLA and the onus would fall on a defendant to seek contribution against potential concurrent wrongdoers.

The Court came to the view that it would be consistent with the purpose and effect of a "non-delegable duty" for a wrongdoer who breaches a non-delegable duty to be liable for the whole of the loss.

The Court also looked at it from the perspective of s 5Q of the CLA and found that the provision should not be read down to exclude a duty imposed by statute (see [70] – [88]).

The significance of this decision is exemplified in this case where nine parties had been identified as concurrent wrongdoers. In the hearing before Rees J, the defendants had argued that because of the broad categories of people to which s 37 of the DBP applies, it would be "unusual and onerous" if every defendant would be liable for 100% of the damage no matter how small or large their role. This decision signifies the onerous duty placed by s 37 of the DBP, which may serve to tighten the precautions taken in the context of construction work.

UNCERTAINTY IN THE SELECTION OF PRODUCTS CAN LEAD TO LITIGATION

Author: Senior Associate Adam Tighe

Floyd and Derek Larsen (**Larsens**) were the trustees of the Larsen Superannuation Fund (**Fund**), which owned a property in Glen Alice, NSW. The Larsens entered into a contract with Tastec Pty Ltd (**Tastec**), for the supply and assembly of a pre-fabricated house. Stephen Sainsbury (**Sainsbury**), was a registered architect and director of Tastec.

The original contract specified that the roof and walls of the house would be clad in "Maxline 340". Tastec and Sainsbury raised concerns regarding the cladding, and the parties agreed to use "Extraline 294". The Larsens identified that Extraline 294 was a product that they had previously rejected with the addition of a T strip down the centre of each panel. In response, they instructed Tastec to use unmodified panels (i.e., without the T strip). The modified panels, including the T strip, were ultimately used in the development of the house.

The Larsens sought damages against Tastec and Sainsbury for breach of contract and/or compensation under the Australian Consumer Law (**ACL**) for deceptive and misleading representations about the supply and assembly of the roof and wall components of their house.

The Larsens' claim failed at first instance. On appeal in *Larsen v Tastec Pty Ltd [2023] NSWCA 39*, the Court dismissed the claim for damages arising from breach of contract, although upheld the ACL claim, which it remitted to the District Court for assessment of damages. The primary reasons were as follows:

- The conduct of the person alleged to have engaged in misleading or deceptive conduct must be assessed as a whole.[1]
- In relation to reliance, the conduct relied upon need only "*make some non-trivial, material, or substantial contribution to the decision to act in a particular way*"[2].
- The primary judge erred by failing to assess reliance at the time when Tastec varied the contract to change the cladding material. Sainsbury adduced a photo attached to an email sent to the Larsens where the T strip was glued to the cladding, following which, the Larsens responded by confirming the need to move to an alternative product, and that they were "*happy to proceed*" with the alternative solution subject to the warranty and paperwork being sorted.
- Construction RFI responses signed by Sainsbury (which were central to the misrepresentation claim) were subsequently sent by Tastec, however, in the context of the above email exchanges, it was interpreted that the RFI responses presented a choice: the Larsens could proceed with the Maxline 340, albeit at the expense of resetting some of the walls and additional thickness on the roof, or, alternatively, they could opt for what Tastec had presented as an alternative solution. The Larsens opted for the alternative solution.

[1] *Butcher v Lachlan Elder Realty Pty Ltd* (2004) 218 CLR 592
[2] *I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd* (2002) 210 CLR 109

Implications

These proceedings arose out of a lack of certainty in the selection of a cladding product, which arguably could have easily been avoided by having an appropriate mechanism/system in place to allow customers to select the products that they want to be utilised with certainty.

This case otherwise serves as a reminder of the importance for building contractors to keep an adequate "paper trail" to evidence their client's selections and instructions.

NEW AIM PTY LTD v LEUNG [2023] FCAFC 67

Author: Partner Patrick McGrath, Senior Associate Mark Beech
Acknowledgement: Emily Bertacco, Zachary Plant

Construction disputes often require lawyers to liaise with a range of experts including building consultants, structural engineers, architects, quantity surveyors and others. In *New Aim Pty Ltd v Leung*[1] (New Aim), the Full Court of the Federal Court of Australia considered the involvement of lawyers in communicating with experts and in preparing expert evidence.

The Full Court in *New Aim* considered the involvement of lawyers in preparing questions for the expert and in the preparation of an expert report and commented upon the necessity for lawyers to disclose their involvement in preparing expert reports and the extent of their communications with the expert.

Background

New Aim's solicitors engaged Ms Fangyun Chen as an expert witness for the purpose of providing opinion evidence in relation to the Chinese goods supplier industry. Subsequently the expert provided the solicitors with the required information, which *New Aim*'s solicitors used to assist in preparing a witness statement annexing a final expert report.

On 7 March 2022, *New Aim*'s solicitors sent a letter of instruction to Ms Chen. On the following day Ms Chen provided her signed witness statement annexing the final expert report to the solicitors.

At first instance, Justice McElwaine[2] dismissed the entirety of the report due to concerns about the 24-hour period in which it was prepared, uncertainty about which sections Ms Chen had authored and whether the opinions expressed in the report were Ms Chen's honest and independent opinions and that no matters of significance had been withheld. The Court also expressed concerns about the failure to adhere to the Court's Expert Witness Code of Conduct and Practice Statement.[3]

New Aim appealed that decision to the Full Court, asserting that the primary judge erred in making these findings.[4]

1 New Aim Pty Ltd v Leung [2023] FCAFC 67 (appeal).
2 New Aim Pty Ltd v Leung [2022] FCA 722 (first instance).
3 Ibid [45]-[78].
4 New Aim Pty Ltd v Leung [2023] FCAFC 67 [61].

Full Court decision

The Full Court outlined the following relevant principles:

1. It is not unusual for a for a final letter of instruction, containing the final form of the questions to be put to the expert, to be finalised shortly before the report is prepared. This is a common occurrence for example where the issues are novel or complex.[5]

2. Questions that an expert is asked to address may or may not be framed at the time of the initial retainer. Further, it held that, "*what is appropriate or desirable depends on any number of circumstances peculiar to the particular case and different equally proper approaches can be expected from different legal practitioners.*"[6]

3. The process by which an expert is engaged should be transparent to ensure that what has occurred is clear to the Court.[7] The material placed before the Court should make clear what has been provided to the expert and the questions that the expert has been asked to address. However, it is not unusual for the formulation of the questions asked of the expert not to have been formalised prior to discussing the issues with the expert. Such discussions would be expected to ensure that questions asked of an expert are not nonsensical or do not miss the real issues.[8]

4. It is permissible and "far from unusual" for solicitors to be involved in drafting written evidence of a factual nature for inclusion in an expert report based upon a statement or other material provided by a witness.[9]

5. However, the Court cautioned solicitors against influencing the expert's opinion and emphasised that ordinarily it would be expected that the expert report will be drafted by the expert rather than the legal practitioner. However, in some circumstances such as where the relevant expert has physical, language or resource difficulties, legal practitioners may be involved in the drafting process. However, it was observed that care must be taken to ensure that the legal practitioner does not suggest what the expert's evidence should be and that the report should be drafted based upon what the expert has communicated to the legal practitioner, "as fact or what the expert has assumed or what the expert's opinion is."[10]

6. The Court further disagreed with the primary judge's assertion that disclosure is mandatory when solicitors are involved in the drafting process. It was held that while disclosure may well be desirable, there is no legal obligation to do so and that, whether there is an ethical obligation to do so will depend upon the relevant circumstances of each case.[11]

Key takeaways

The Full Court refrained from establishing rigid rules in relation to the process for engaging an expert witness but provided valuable insights into the process of briefing and instructing experts in legal practice. It emphasised that the interpretation of the appropriate process is left to the solicitors and specified broad principles of conduct, as outlined in points 1-6 above. It is clear from the case that lawyers can discuss the framing of questions with the expert as long as they are careful to not influence the expert's opinion. Further, it appears that some drafting of factual matters for inclusion in the expert report may be permitted, in appropriate circumstances, although solicitors must be cautious not to influence the opinion of the expert in doing so.

[5] Ibid [87].
[6] Ibid [89].
[7] Ibid [89].
[8] Ibid [89].
[9] Ibid [112].
[10] Ibid [120]
[11] Ibid [121]

HASTWELL v PARMEGIANI [2023] NSWSC 1016

Author: Partner Patrick McGrath, Senior Associate Mark Beech
Acknowledgement: Emily Bertacco, Zachary Plant, Patrick McNamara

In managing building and construction disputes it is often necessary to obtain opinion from experts who may ultimately give evidence in legal proceedings. The NSW Supreme Court decision in *Parmegiani*[1] explores the scope of witness immunity available to expert witnesses under Australian law.

The rationale for witness immunity was explained in the decision as follows.[2]

- First, to safeguard the witness by allowing them to give evidence without the potential threat of legal action against them.[3]
- Second, to preserve the finality of litigation and avoid a multiplicity of actions.[4]

Whilst witness immunity is normally associated with witnesses giving evidence in court, in this case the NSW Supreme Court was required to consider the extension of witness immunity to work undertaken by an expert witness out of court, in circumstances where no expert report was ultimately relied on in legal proceedings.[5]

Background

Dr Parmegiani was appointed to provide his opinion and produce a report on Mr Hastwell's psychological condition. Dr Parmegiani was tasked with assessing Mr Hastwell's condition on matters such as the extent of his psychological condition(s), their cause(s), his fitness for work and mental capacity to participate in ongoing legal proceedings.[6] When instructed, Dr Parmegiani was advised that he may be called upon as an expert witness to provide evidence. In addition, Dr Parmegiani was provided with a copy of the relevant sections of the *Federal Court Rules 2011* (Cth) dealing with expert evidence and the Federal Court Practice Note.[7] He was specifically directed to specify that his report complied with the Practice Note.[8]

The report completed by Dr Parmegiani contained an acknowledgement that his report complied with the Federal Court Expert Witness Code of Conduct.[9] Dr Parmegiani's report was, however, never filed or served in legal proceedings.[10]

Mr Hastwell commenced proceedings against Dr Parmegiani, alleging he had acted in breach of his fiduciary duty, the *Australian Consumer Law* (**ACL**) and his duty of care.[11] The focus of the application and submissions was whether witness immunity rendered the Plaintiff's case untenable.[12] Therefore, the central question in issue in the proceeding was the principle of expert witness immunity and the circumstances under which it is enlivened in Australian law, and whether the purposes of obtaining an expert report affects the application of the relevant principles.[13]

Submissions

During the proceeding, Dr Parmegiani submitted that he had absolute immunity due to his report being used for the purposes of litigation.[14] He further submitted that the preparation of his report was sufficiently connected to legal proceedings so as to result in the immunity operating to protect him from

1 Hastwell v Parmegiani [2023] NSWSC 1016
2 Ibid [53], citing Commonwealth of Australia v Griffiths & Anor (2007) 70 NSWLR 268 at [41]-[43].
3 Ibid, citing D'Orta-Ekenaike v Victoria Legal Aid at 17-20 [37]-[42]; Meadow v General Medical Council [2007] QB 462 at 476.
4 See ibid.
5 Ibid [53].

6 Ibid [31].
7 Ibid, [32]-[33].
8 Ibid.
9 Ibid [34].
10 Ibid [46].
11 Ibid [1].
12 Ibid [40].
13 Ibid [71].
14 Ibid [48].

suit, despite claims of potentially false or malicious evidence and whether his report was adduced as evidence in court or not.[15]

Mr Hastwell submitted that as Australia had not yet made a determination with respect to witness immunity, the principles established in the United Kingdom should be followed by Australian courts.[16] Consequently, it was submitted that for expert witness immunity to apply, it required a report and the giving of evidence in court, the second limb of which had not been made out in this instance.[17] Mr Hastwell also submitted that Dr Parmegiani's report was not prepared with sufficient connection to the relevant legal proceedings.[18]

Decision

Justice Cavanagh disagreed. His Honour held that expert witness immunity provides protection from suit despite any litigated causes of action. He further held that the use of the expert report in court proceedings was not a precondition for expert witness immunity to apply.[19] He also said that in order to determine whether the immunity exists, it was necessary to examine the purpose for which the expert report was obtained. If the report was obtained merely for the purposes of obtaining the expert's opinion and investigating a *potential* legal proceeding, for example, the availability of immunity may be in question.[20]

The Court noted the following critical facts in this instance:

a. the letter of instruction and expert report demonstrated that the Plaintiff retained Dr Parmegiani to offer his expert opinion and prepare a report in accordance with the Code of Conduct[21]

b. referral to the AHRC was only the first step in the process of seeking substantial damages and the fact that the AHRC is not a court was not in itself determinative[22]

c. there is a clear distinction between an expert providing a report advising on prospects of success, evidence or issues and an expert being retained pursuant to the Code[23]

d. the report had been prepared in compliance with the Code of Conduct, Dr Parmegiani had been advised by the solicitors that the report might be presented in legal proceedings and that he might be required to give evidence,[24] and

e. the argument that, as the report was commissioned prior to lodgement with the AHRC immunity did not apply, was dismissed as the claim included a claim for compensation which, if not resolved, would have resulted in litigation being instituted.[25]

Key takeaways

The decision articulates the extent of expert witness immunity in Australia, in contrast with the position in the UK. The decision establishes that, for immunity to apply, it is not essential for the expert to give evidence in court or for legal proceedings to be instituted.[26] However, there must be a sufficient nexus between the work undertaken by the expert and legal proceedings that are either on foot or anticipated.[27] Retaining an expert to assist with advice being given in relation to prospects of success may not provide a sufficient connection to legal proceedings for immunity to apply. However, where the expert is required to comply with an applicable code of conduct on the basis that they may be required to give evidence in court, immunity from suit may be capable of being established.[28]

To ensure that expert witnesses asked to give evidence in construction disputes are afforded witness immunity, whether or not their evidence is ultimately relied upon in proceedings, it is important to consider, at the time of briefing them, whether there is a connection between the work that they are being asked to undertake, and current or threatened legal proceedings, whether the expert may be required to give evidence in those proceedings and whether the expert is required comply with the applicable code of conduct.

15 Ibid [49].
16 Ibid [50].
17 Ibid.
18 Ibid [51].
19 Ibid [70].
20 Ibid [71], [76].
21 Ibid [74].
22 Ibid [75].
23 Ibid [76].
24 Ibid [79].
25 Ibid [81].
26 Ibid [83].
27 Ibid [53].
28 Ibid [89].

YOUR OWN BREACH WON'T HELP YOU

Author: Senior Associate Adam Tighe

The application in the matter of *Veesaunt Property Syndicate 1 P/L v Alliance Building and Construction Pty Ltd* [2023] QSC 129 concerned a contract for the construction of residential townhouses on the Gold Coast. The respondent, Alliance Building and Construction Pty Ltd, was the contractor and was obliged to carry out and complete the design and construction of the works for the applicant, Veesant Property Syndicate 1 Pty Ltd, as principal.

There were a number of conditions precedent that were not satisfied prior to the date stipulated within the contract, however, the contract allowed those to be waived by "*written notice from the principal*". The conditions precedent related to the approval of finance by a financier at the principal's discretion, the contractor submitting evidence to demonstrate that the applicable policies of insurance had been instated, the contractor's execution of a deed of guarantee and indemnity, the contractor providing the requisite security, and the contractor executing the financiers' deed.

Dean Weintrop, on behalf of the principal, sent correspondence to the contractor on 29 July 2022, in his capacity as "superintendent", stating that the conditions precedent clause under the contract had been satisfied (**Notice**). The contractor contended that the performance of those conditions was therefore waived.

The principal sent further correspondence on 21 November 2022 affirming its position that the contract remained on foot but stated that "*to the extent it is necessary to do so and without admission that these conditions have not been satisfied or waived, the principal hereby waives each and every one of the requirements of* [the conditions precedent]".

The questions to be resolved before the Court were therefore whether the Notice effectively waived the conditions precedent, if the conditions precedent were not waived or satisfied by the date agreed was the contract terminated or voidable and whether the principal subsequently affirmed the contract.

One of the key principles considered within these proceedings was that from *Prospect Resources Ltd v Molyneux* [2015] NSWCA 171 (**Molyneux**)[1], wherein the consideration of whether a letter amounted to a waiver required "*… the letter to communicate unequivocally that compliance with relevant conditions was no longer required or was taken as having been satisfied*".

[1] Ward JA, with whom Beazley P and Leeming JAS agreed.

The Court found in favour of the principal for the following reasons:

- The Notice was not a clear, unequivocal, and deliberate waiver of the conditions precedent and did not waive those conditions in accordance with the contract.
- The principal was the only party who could waive the conditions precedent - which were largely for its benefit - however, any waiver had to be in accordance with the contract and not under general law.
- The contract demonstrated a clear intention of the parties that if the conditions precedent were not satisfied or waived by the principal, the contract would terminate on the date nominated for such satisfaction or waiver to occur. Notwithstanding that construction, the prevention principle does not allow a party who is in default from taking advantage of that default. In the present case it was the contractor who had failed to comply with the conditions precedent and the relevant terms of the contract. In those circumstances it could not take advantage of its default and rely on conditions it had not satisfied to contend that in the absence of a waiver, the contract had terminated.
- The principal's email of 21 November 2022 was sufficient to satisfy the Court that the principal had elected to proceed with the contract.

The Court ordered that the contract remained on foot and a declaration should be made in the applicant's favour.

A notice of appeal was filed on 12 July 2023. The status of the appeal is unknown.

Implications

This case highlights the continued relevance of the prevention principle, whereby a party at fault is not permitted to rely upon its own breach to argue the automatic termination of a contract.

SUPERVISE YOUR CONTRACTORS OR RISK THE CONSEQUENCES

Author: Special Counsel Victoria Huntington

Nova Builders Pty Ltd v Beno Excavations Pty Ltd (No 3) [2023] ACTSC 319 (3 November 2023)

Nova Builders Pty Ltd v Beno Excavations Pty Ltd (No 3) [2023] ACTSC 319 (8 December 2023)

This case demonstrates the potential danger of allowing an individual contractor to assume the conduct of a construction project, including negotiating and entering into contracts for that project, without any oversight.

In its decision, the ACT Supreme Court found that the contractor had been allowed to hold himself out as a general manager of the company performing work for the project, including giving directions about payment for the work undertaken. The contractor directed payment for the work to his own company and then caused that company to assume the conduct of the project.

What followed was no less than five separate proceedings between the parties involving complex legal questions, including two adjudication decisions by an adjudicator appointed under the *Building and Construction Industry (Security of Payment) Act 2009* (ACT).

Below are some steps to avoid a similar situation occurring.

Background

In 2019 and 2020, Nova Builders Pty Ltd (**Nova**) was undertaking a residential development project in Greenway ACT (the **Greenway project**), which included excavation work and hydraulics work.

Beno Excavations Pty Ltd (**Beno**) was a civil contractor and provided excavation and hydraulics work to Nova for the Greenway project.

Mr M contracted with Beno to provide services as a general manager to Beno for the Greenway project. Before he resigned on 3 March 2020 and unbeknownst to Beno, Mr M had issued two invoices to Nova totalling $550,000, directing payment for work performed by Beno to his own company, Civil and Civil Corporation Pty Ltd (**Civil**). Nova paid the invoices.

When Mr M left Beno on 3 March 2020, Beno was unable to complete the Greenway project and Civil carried out the balance of the works on the site. Civil subsequently issued further invoices to Nova for that work totalling $462,003.93.

Nova was then faced with competing claims from Beno and Civil for payment of invoices.

Beno claimed that it was entitled to payment for the work done prior to 3 March 2020 and said that Nova had wrongly paid Civil. Civil said that it had been correctly paid and that Nova owed Civil a further amount of $462,003.93 for work done after 3 March 2020.

Nova's position was that it was prepared to pay for the work but did not know who to pay and did not wish to pay one party only to have another party successfully sue it for that amount.

One of the issues in the case was whether the work undertaken before 3 March 2020 was undertaken by Beno as part of a joint venture with Civil and other companies identified in Civil's invoices. If not, then Civil had no entitlement to issue invoices to Nova on its own or on behalf of any joint venture.

Findings

In the first of two separate decisions, the Court found that:

- Beno was not part of any joint venture with Civil.
- Before 3 March 2020, the contract for the works was with Beno not Civil.
- Civil had no entitlement to issue invoices before 3 March 2020 on its own behalf or on behalf of any joint venture. This was because the evidence of how the joint venture arose, and its terms, were conspicuously lacking. There was nothing to indicate that Nova would be dealing with a joint venture as distinct from a single contractor, Beno.
- Nova paid the invoices totalling $550,000 by reason of a mistake, believing that the payment made by Nova was for the benefit of Beno and at its direction.
- Nova was entitled to offset the payments made for the earlier invoices against the claim for work performed by Civil after 3 March 2020.

In the second decision, the Court found on the question whether Nova breached its contract with Beno (by preferring Civil to perform the work after 3 March 2020) or Beno breached its contract with Nova (by failing to carry out the works after 3 March 2020), that neither of the parties were in breach and the contract was discharged as a result of an agreement. In that regard, the Court found that:

"[Mr M]'*s deceitful and self-interested conduct had put Nova in a position where it did not know whether Civil or* [Beno's] *claim was correct. Nova was obviously very anxious to have the works proceed promptly because they were essential to a construction project worth tens of millions of dollars.* [Beno] *was in a position where it had lost its general manager, did not have detailed knowledge of the project and was not keen to impede the progress of works done for Nova's benefit.*"

The Court also found that Mr M was authorised to make representations that he was the general manager of Beno, had authority to enter into contracts on behalf of Beno (including with subcontractors) and to do so without reference to anyone else, and was responsible for managing Beno's interests on the Greenway project.

The Court concluded that Mr M had authority from Beno of such breadth that it extended to making claims for payment from Nova. Given that Nova acted to its detriment by paying the invoices provided by Mr M, Beno was estopped from denying that the invoices issued by Mr M, including the direction to pay Civil, were done with the authority of Beno and therefore binding on it. Notwithstanding possible signs that something was amiss, Nova was in fact deceived as to the authority of Mr M to give the direction he did.

The Court concluded that as Beno had unfortunately placed its trust in Mr M, rather than Nova, Beno must bear the consequences of his conduct.

While Beno was found to be entitled to payment by Nova for the market value of the work performed before 3 March 2020, it was ordered to pay Nova's costs (to the extent not able to be recovered from another party), perhaps reflecting the Court's findings that Beno had authorised Mr M to engage in the conduct he did.

Steps to avoid a similar situation in the future

Steps that might be taken to avoid a similar dispute occurring in the future include:

Insisting that all arrangements are recorded in writing, including between the civil contractor and its subcontractors.

Supervising the project team closely.

Setting up internal reporting systems to keep informed about the status of projects.

Make unannounced, informal audits of projects.

Use purchase orders and pre-numbered invoices for the work.

Protect computer systems and software, and restrict access to computer terminals and records.

Where possible, have the directors and/or owners of a company participate in contract negotiation and formation.

AS SUITE UPDATE: NSW AND VICTORIAN SUPREME COURTS GUIDANCE ON PRACTICAL COMPLETION AND THE SUPERINTENDENT'S ISSUANCE OF A CERTIFICATE OF PRACTICAL COMPLETION

Author: Partner John Kehoe
Acknowledgement: Ben Hicks

The recent cases of *J Hutchinson v Transcend Plumbing and Gasfitting* [2023] VSC 39 and *Parkview Constructions Pty Ltd v Futuroscop Enterprises Pty Ltd* [2023] NSWSC 178 has provided guidance on practical completion and the superintendent's issuance of a certificate of practical completion under the AS suite.

The cases demonstrate that when '*practical completion*' is achieved is linked to the issuance of the *certificate of practical completion*'. The superintendent should ensure that the '*certificate of practical completion*' is a formal document, given the seriousness of its implications in the events it triggers at practical completion. The certificate of practical completion should also, unless the contract is amended to provide otherwise, not be labelled a conditional certificate and this will have no effect under the AS Suite and should be rejected by a contractor.

CLARITY PROVIDED AROUND ADDITION OF NEW CLAIMS TO EXISTING PROCEEDINGS

Author: Partner Kiley Hodges

Parkview Constructions Pty Ltd v The Owners – Strata Plan No 90018 [2023] NSWCA 66

The Owners–Strata Plan No 90018 (**Owners**) is the Owners Corporation for a development in Haymarket, NSW comprising 286 residential apartments and associated parking and storage spaces. The development was designed and constructed by Parkview Constructions Pty Ltd (**Parkview**) pursuant to a contract between Parkview and the former owner/developer, The Quay Haymarket Pty Ltd (**Quay**).

The Owners claimed that, as the immediate successor in title to Quay in relation to the common property, it was entitled to the benefit of statutory warranties pursuant to the *Home Building Act 1989* (NSW) (**Act**). It further claimed that 85 alleged defects in the common property were caused by Parkview's breach of "one or more" of the statutory warranties specified in the Act. After commencement of proceedings, the Owners sought leave to include claims for breaches of statutory warranties pursuant to s 18B of the *Home Building Act* for an additional three defects (including one relating to non-compliant façade materials).

The central issue was whether separate causes of action arose for each defect or whether they were aspects of the same causes of action already pleaded. If found to be separate causes of action, the claims would be statute barred as they were made out of time.

In our December 2022 Construction Update, we outlined the decision of the trial judge, in *Owners of Strata Plan No 90018 v Parkview Constructions Pty Ltd* [2022] NSWSC 1123, who held that there was a single cause of action and granted leave to include the three defects.

The Court of Appeal dismissed the appeal. The Court held that the Owners' claims were best regarded as claims for breach of contract, despite the fact that the Owners was not a party to any contract. The nature of the claim was that the building had not been provided in accordance with the terms of the contract. An amendment that did nothing more than introduce further departures from the building as promised would not give rise to a new cause of action, and the amendments were permitted.

Implications

This decision provides clarity with respect to limitations issues impacting claims for additional defects where proceedings are already on foot. It should be cautioned however, that the Court of Appeal clarified that the outcome would have been different if a new party was being added to an existing claim.

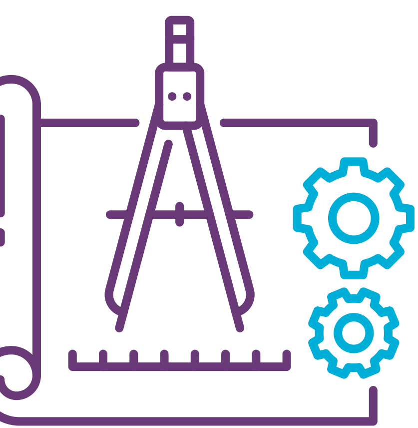
THE OWNERS-STRATA PLAN 86807 v CROWN GROUP CONSTRUCTIONS PTY LTD [2023] NSWSC 44

Author: Senior Associate Adam Tighe

The owners corporation commenced proceedings against the builder, Crown Group Construction Pty Ltd, and developer, Crown W Pty Ltd, for breaches of warranties implied under s 18B of the *Home Building Act 1989* (NSW) (HBA) in respect of alleged defects in cladding materials used in the development of a residential strata building.

The NSW Supreme Court heard an application to include out of time claims for breaches of duties implied by s 37 of the *Design and Building Practitioners Act 2020* (NSW) (**DBP**) together with new claims under the HBA related to the cladding.

The final occupation certificate was issued on 12 December 2014. Questions about the suitability of the cladding were raised in 2018, however, the application was not heard until December 2022. The limitation period for minor defects is two years, whereas the limitation period for major defects in six years, which had lapsed in the present case.



The Court relied upon ss 60 - 64 of the *Civil Procedures Act 2005* (NSW) to emphasise its discretionary powers to permit an amendment in circumstances where a new cause(s) of action is statute barred. Notwithstanding, the court relied upon the following broad reasons in refusing to allow the additional claims under the HBA:

- There was no evidence before the Court that the owners corporation had an arguable case that the cladding did not conform with the *Building Code of Australia 2012* (**BCA**), as the "peer review" report relied upon by the owners corporation stated that there was "*no evidence to show the cladding complied with the BCA that applied at the time of the construction*", however, it failed to provide evidence to show how the cladding was defective.
- The owners corporation had ample opportunity to investigate the cladding but did not do so, whereby it was aware of the issues since 2018 and failed to obtain its own expert report (i.e., over and above the peer reviewed report) to ascertain the extent to which the cladding was defective.
- The delay was likely to have caused the defendants prejudice given that statutory warranty claims are not apportionable and any pass-through claims against their sub-contractors would have been statute barred.

The Court found, in regard to the claims under the DBP, that the pleadings did not provide proper particulars as to how the builder was negligent and declined the owners corporation's application to amend. The Court did, however, allow the owners corporation the opportunity to replead its case against the builder under the DBP if it wished to do so and then it would be at the discretion of the Court as to whether that additional claim could be accepted in the context of the delay.

Implications

The Court did not permit the addition of new defects to an existing claim for breaches of the statutory warranties under s 18B of the HBA, following the lapsing of the warranty periods, which occurred in the matter of *Owners of Strata Plan No 90018 v Parkview Constructions Pty Ltd* [2022] NSWSC 1123 (**Parkview**).

Notwithstanding, it will be interesting to see if the Court does ultimately permit the additional out of time claims, once replead, consistent with Parkview, or if the limitation periods will be applied as hard deadlines.

If the latter scenario is adopted, the insurance industry will be able to breathe a sigh of relief as the open-ended timeframes introduce further risk and uncertainty from claims perspectives.

This case otherwise serves as a reminder of the importance of obtaining reliable evidence that substantiates any alleged defects at the earliest opportunity.

KRONGOLD v THURIN [2023] VSCA 191

Author: Partner Patrick McGrath
Acknowledgement: Kalina Sobczak and Emily Bertacco

This decision, handed down by the Victorian Court of Appeal on 17 August 2023, is the latest in a series of decisions made in connection with this protracted building dispute arising from the construction of a new residence in Toorak.

In *Thurin v Krongold*[1] (**Thurin**), an earlier Court of Appeal decision, the Court of Appeal held that, whereas VCAT had power to deal with domestic building disputes, it did not have the power to hear domestic building disputes involving federal matters such as the interpretation and application of Commonwealth legislation.

As a result of that decision, VCAT Justice Quigley, as President of VCAT, struck out the proceeding and referred the matter to the Supreme Court under s 77 of the VCAT Act[2].

This referral of the proceeding to the Supreme Court resulted in several questions of law being referred to the Court for determination under s 17B of the *Supreme Court Act 1986*. Those questions were ultimately referred to the Court of Appeal.

Two of the three questions referred were, in summary:

1. What is the effect of Justice Quigley's referral pursuant to s 77(3) of the VCAT Act?
2. Having regard to the answer to question 1, do ss 134 and./or 134A of the *Building Act 1993*[3] bar the Thurins' claims against the builder and architect?

Findings and key takeaways

The Court of Appeal responded to the above questions, concluding that:

A referral to the Supreme Court under s7 7 of the VCAT Act activates the jurisdiction of the Supreme Court without the need for a new initiating process.

In striking out the proceeding, VCAT was not dismissing the proceeding, but the subject matter of the proceeding was to be determined in the appropriate forum.

Section 57 of the *Domestic Building Contracts Act 1995* (Vic) does not limit the referral power and expressly recognises that VCAT may refer matters to a court.

Such a referral does not constitute the commencement of a building action for the purposes of the 10-year limitation provisions set out in ss 134 and 134A of the *Building Act 1993* (Vic) hence the limitation provisions did not bar the Thurins' claims.

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[1] *Thurin v Krongold* [2022] VSCA 226 [1].

[2] *Victorian Civil and Administrative Tribunal Act 1998* (Vic) s77

[3] Section 134 of the *Building Act 1993* (Vic) prescribes a 10-year limitation periods for building actions after the date of issue of the occupancy permit or the date of issue of the certificate of final inspection for the building work. Section 134A of the *Building Act 1993* prescribes a 10-year limitation for actions in respect of pluming work, following the date of issue of the compliance certificate.

In circumstances where the Court of Appeal's previous decision in *Thurin* substantially limited VCAT's jurisdiction and resulted in many applications by parties to refer matters out of VCAT and into Victorian courts, this decision provides welcome clarification of the impact of those transfers from a limitation of actions perspective.

Interestingly, the Court of Appeal also observed in passing that the question whether a proceeding involves federal jurisdiction, in the sense that its determination will involve or require the exercise of federal judicial power, is to be determined in the first place by reference to the pleadings and constituent documents. However, the Court noted that it may be necessary to go beyond the pleadings in order to determine the scope of the action.

It will be interesting to see what the legislative response will be to the controversy caused by the original Thurin decision and whether this resolves the question marks that currently arise in relation to the extent of VCAT's jurisdiction.

WHAT'S THE LOCATION? A COMMON SENSE CONSTRUCTION

Author: Special Counsel Sarah Richards

In *Acciona Infrastructure Australia Pty Ltd v Zurich Australian Insurance Ltd* [2023] FCAFC 47, the Full Court of the Federal Court applied a common sense interpretation when determining the operation of a rainfall event exclusion clause in a Construction Risks - Material Damage Project Insurance Policy (Policy) issued by the Respondent Insurers to the NSW Roads and Maritime Services (RMS) under which the Applicant contractors (Acciona Infrastructure Australia and Ferrovial Construction (Australia)) (Contractors) were third party beneficiaries.

In or about July 2014, the Contractors entered into a design and construct project deed with the RMS under which they agreed to perform works (**Project Works**), including construction of a 19.5 kilometre stretch of dual carriageway between Warrell Creek and Nambucca heads in northern New South Wales. As a result of heavy rainfall and flooding in areas of the east coast of Australia on or about 4 and 5 June 2016, the Contractors claimed that the Project Works were damaged, both to the south and to the north of the Nambucca River and sought indemnity under the Policy.

The Respondent Insurers sought to rely on an exclusion, which excluded cover for loss or damage due to rain on earthwork materials and or pavement materials, except where such loss or damage was due to a one-in-twenty-year rain event as measured by the nearest Bureau of Meteorology (**BOM**) station to the "*location insured*," or such other independently operated weather station situated near or adjacent to the "*location insured*".

At the material times, the BOM operated at least two weather stations situated to the east of the Project Works and north of the Nambucca River. In addition, two automatic weather stations were established on the site of the Project Works: Site Southern Automatic Weather Station and Site Northern Automatic Weather Station. During the 24 hour period between 6am on 4 June 2016 and 6am on 5 June 2016, neither of the BOM weather stations (which were nearest to the location where there was damage to the contract works north of the Nambucca River) recorded rainfall that exceeded a one-in-twenty-year rainfall event. However, the Site Southern Automatic Weather Station recorded rainfall within that same period that exceeded a one-in-twenty-year rainfall event for that location.

"*Location insured*" was not a defined term in the Policy, unlike "*Project Site*" and the Full Court was required to determine what was meant by the term "*location insured*" in the context of the exclusion. In determining the operation of the exclusion and its writeback in favour of the Respondent Insurers, the Full Court observed that if the parties had intended to refer to the area of the entire Project Works, it would have been easy for them to do so by use of the term "*Project Site*", which was specifically defined in the Policy, rather than the use of the more limited term of "*location insured*". However, applying a construction conforming to logic and the adoption of business efficacy, the Full Court held that "*the expression "location insured" should be construed as that place within the Project Site (as defined in the Policy) where the loss or damage in respect of which the claim is made has occurred*".

NON-DISCLOSURE: THE RISK OF NO COVER

Author: Special Counsel Sarah Richards

The decision of the NSW Court of Appeal in *Citiline Concrete Pumping Pty Ltd v Chubb Insurance Australia Ltd [2023] NSWCA 123* highlights the importance of the duty of disclosure and the implications for insureds and their brokers if the duty is not complied with.

At first instance, Citiline's claim for indemnity under its Chubb Mobile Plant & Equipment Policy for property damage to its Volvo truck and attached boom pump, which occurred on 21 February 2019, was dismissed .

The primary judge held that Citiline had failed to comply with its duty of disclosure and made a misrepresentation to Chubb before the relevant contract of insurance was entered into. In particular, when seeking cover, Citiline's broker had reported that there had been "*no accidents/claims/convictions*" despite two previous incidents involving significant damage to the Volvo truck and boom pump. Cover was offered by Chubb on the basis that there had been "*nil losses or claims [for the] last 5 years*", without any correction by the broker.

As a result, the primary judge held that Chubb was entitled to reduce its liability in respect of Citiline's claim to nil under s 28(3) of the *Insurance Contracts Act 1984* (**Act**). The primary judge also held that Citiline's claim was made fraudulently, entitling Chubb to refuse payment of that claim under s 56(1) of the Act.

The Court of Appeal upheld the primary decision and dismissed Citiline's appeal. The Court of Appeal upheld the finding that the statement that there had been no accidents was not correct, in circumstances where it would have been clear to the broker before the insurance contract was entered into that the previous incidents resulting in loss or damage were relevant to Chubb's underwriting of the risk.

[1] *Citiline Concrete Pumping Pty Ltd v Chubb Insurance Australia Ltd (No 2)* [2022] NSWSC 1152

WSP STRUCTURES PTY LTD v LIBERTY MUTUAL INSURANCE COMPANY T/AS LIBERTY SPECIALTY MARKETS [2023] FCA 1157

Author: Partner Kiley Hodges and Senior Associate Adam Tighe
Acknowledgment: Sophie Little

Background

This decision, handed down by the Federal Court of Australia on 28 September 2023, involved claims made against WSP Structures Pty Ltd (**WSP**), the structural engineer for Sydney's Opal Tower project, which infamously suffered structural cracking that forced a dramatic evacuation on Christmas Eve 2018.

WSP was engaged by the head contractor for the project, Icon Co NSW Pty Ltd (**Icon**), under a sub-contract agreement. In the resulting litigation, Icon sued WSP, claiming that it was liable for the structural cracking. The claims against WSP were settled in 2022 in accordance with the following payments:

An amount to settle Icon's claim – this amount was paid by WSP's parent company, WSP Australia (**WSP Australia Payment**).

An amount to settle a class action brought by the apartment owners – this amount was paid by WSP's professional indemnity insurer (**WSP Indemnity Insurer Payment**).

The legal costs of the proceedings, which were paid by WSP Australia.

Federal Court of Australia proceedings

WSP subsequently made a claim for indemnity for the WSP Australia Payment and its legal costs on Icon's third-party liability policy (**Icon Liability Policy**). The Icon Liability Policy insurers declined to cover WSP on the following grounds:

1. WSP was not covered under the Icon Liability Policy at all
2. WSP had claimed indemnity under its professional indemnity policy, and as such, the Icon Liability Policy insurers argued that the indemnity principle applied, and WSP could not seek additional / alternative recovery, and
3. as the payment had been made by WSP Australia, WSP was not entitled to indemnification.

Cover under the Icon Liability Policy:

The Court considered the wording of the Icon Liability Policy, and concluded that on the proper construction of the terms of the Policy, WSP fell within the definition of "insured", which included:

> "… ***sub-contractors engaged by any of the above*** [which included Icon, as a named insured]".

Relevantly, the Court did not consider that the term "sub-contractor" was limited to construction contractors on the basis that the description of the primary insured's business within the Icon Liability Policy included reference to "*builders, engineers, construction contractors*, [and various other professions]". That broad wording was not a description of the primary insured's business, but rather a broader description of ancillary and related professions.

Indemnity principle

The Court considered the indemnity principle. This is the principle whereby there are two promises of indemnity in respect of the same liability, however, the promisee can only recover in full under one.

In its discussion of this principle, the Court considered how far matters must proceed in respect of the claim made under one policy before the alternative insurer can plead an indemnity under the first policy as a defence. The Court considered that indemnity would not be considered received until the agreement was performed. In other words, it is the receipt of the indemnity in full from one insurer that means there is nothing for the second insurer to indemnify. Until then, the insured may pursue both insurers until indemnity is received. This interpretation was also reliant upon s 76 of the *Insurance Contracts Act* 1984 (Cth), which states (our emphasis added):

> *"(1) When 2 or more insurers are liable under separate contracts of general insurance to the same insured in respect of the same loss, the insured is, subject to subsection (2), entitled immediately to recover from any one or more of those insurers such amount as will, or such amounts as will in the aggregate,* ***indemnify the insured fully in respect of the loss****.*
>
> *(2)* ***Nothing in subsection (1) entitles an insured:*** *(a) to recover from an insurer an amount that exceeds the sum insured under the contract between the insured and that insurer; or (b)* ***to recover an amount that exceeds, or amounts that in the aggregate exceed, the amount of the loss*** *…"*

Therefore, WSP was entitled to pursue its rights under two policies of insurance covering the same risk. In the present case, the payments were not made in circumstances that gave rise to an application of the indemnity principle. As such, the Court held that the applicant was entitled to claim indemnity.

Payment by WSP Australia

The Icon Liability Policy insurers argued that, as the payment had been made by WSP Australia, WSP was not an entity that required indemnification. The Court considered that having regard to the relationship between the companies, it could be inferred that WSP Australia made the payments on the basis that WSP would pursue any and all rights that it may have to recoup or recover the costs and account for those monies to WSP Australia.

WSP's position was that if and when, such funds were recovered, there would be a liability to account for the monies to WSP Australia, which did not mean that the legal fees were not expenses incurred by WSP.

The Court was satisfied that the expenses were incurred by WSP and that the payment by WSP Australia was not made by way of indemnity. Therefore, WSP was entitled to indemnity under the Icon Liability Policy insurance.

Implications

The Court considered how insurance policies should be interpreted in like scenarios. They found that there was a need to adopt a business-like construction, informed by the commercial purpose, that is served by the whole of the policy, and the words used are to be given their natural and ordinary meaning. That is, the meaning that they would be given by a reasonable person in the position of the parties. This approach should be kept in mind when drafting and interpreting policies.

The policy wording and circumstances of this case allowed a professional services firm to claim indemnity as a 'sub-contractor' under a liability policy. The definition of the primary insured's business was considered in this case and given that the Icon Liability Policy insurers description was very broad, it opened the door to indemnity to a third-party professional that may not have otherwise be indemnified under such a policy. Therefore, liability underwriters and insurers should be mindful of the potential exposure to engineers and other professionals under their policies that provide cover for 'sub-contractors'.

PRECONDITION TO PROGRESS PAYMENT INEFFECTIVE: *A-CIVIL AUST PTY LTD v MESO SOLUTIONS PTY LTD* [2023] NSWSC 372

Authors: Special Counsel Carly Roberts and Senior Associate Matthieu Byrnes
Acknowledgment: Luisa Ganko

In *A-Civil Aust Pty Ltd v Meso Solutions Pty Ltd* [2023] NSWSC 372, the NSW Supreme Court held that a contract clause that delayed the date for payment of a progress payment until 20 days after the contractor submitted certain documents, was ineffective.

This case involved a subcontract between Meso Solutions Pty Ltd (**Meso**) and A-Civil Aust Pty Ltd (**A-Civil**) for construction works at a carpark at the Parramatta RSL (the **Contract**).

Under the Contract, A-Civil did not have to make a progress payment until 20 days after Meso had given A-Civil certain documents prescribed in the Contract.

In considering Meso's right to a progress payment, the Court confirmed that the Contract could not oust s 11(1B) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**), which requires head contractors to make progress payments to subcontractors 20 business days after a payment claim is made.

In making its determination, the Court held that the primacy of the date for payment in s 11(1B) of the SOP Act is indicated by s 11(8) of the SOP Act, which voids contract clauses that allow a principal or head contractor to pay a progress payment later than the date required under the SOP Act.

The Court also found that, in the alternative to the above, even if the Contract did not contravene s 11(1B) of the SOP Act, the relevant Contract clause would nonetheless be void under s 34 of the SOP Act as it modified or restricted the application of the SOP Act.

Whilst not considered in the case, the same reasoning is likely to apply to clauses that permit a principal to pay progress payments later than required under the SOP Act. This is because s 11(1A) of the SOP Act, like s 11(1B), requires principals to make progress payments to contractors 15 business days after a payment claim is made, and s 11(8) also applies to s 11(1A) of the SOP Act.

An interesting issue also considered in this judgment was whether Meso made misleading or deceptive representations in conversations, being that Meso would withdraw its adjudication application and not require A-Civil to issue a payment schedule.

In considering this issue, the Court restated the law that where a foundation for a cause of action is based on spoken words, the conversation must be proved to the reasonable satisfaction of the Court. The Court held that the most reliable sources of evidence for doing so are contemporaneous documents, objectively established facts and the apparent logic of events.

After considering a range of evidence including telephone records and emails, the Court was not reasonably satisfied that the alleged conversations had occurred.

The key takeaways from this case are that:

principals and head contractors should not require that their contractors meet additional conditions to those under the SOP Act before they are entitled to a progress payment

conditions requiring contractors to meet additional conditions to those under the SOP Act before they are entitled to a progress payment may be held to be void, and

when relying on key evidence from spoken conversations, it can be worthwhile to lead other contemporaneous evidence that supports the existence of the conversation and what is alleged to have been said.

TAYLOR CONSTRUCTION GROUP PTY LTD v ADCON STRUCTURAL GROUP PTY LTD [2023] NSWSC 723

Authors: Partner Paul Tobin and Senior Associate Matthieu Byrnes

Acknowledgment: Luisa Ganko

In *Taylor Construction Group Pty Ltd v Adcon Structural Group Pty Ltd* [2023] NSWSC 723, the NSW Supreme Court considered a subcontractor's ability under s 13(1C) of the *Building and Construction Industry Security of Payment Act 1999* (NSW) (**SOP Act**) to only serve a single payment claim after a construction contract is terminated.

The case considered an interesting factual scenario where the contractor, Adcon Structural Group Pty Ltd (**Adcon**), elected to affirm, then later terminate, two contracts with Taylor Construction Group Pty Ltd (**Taylor**) for the supply of structural steel (**the Contracts**).

In March 2023, Taylor claimed that Adcon had not progressed the works under the Contracts or repaid $6.3m that Taylor had pre-paid to Adcon; Taylor wrote to Adcon purporting to terminate the Contracts.

In response to Taylor's purported termination, Adcon issued notices to Taylor disputing the terminations and requested a meeting to attempt to resolve the dispute in good faith – At trial, both Adcon and Taylor agreed that Adcon had elected to affirm the Contracts by giving these notices.

Taylor responded to Adcon's dispute notices by affirming its termination of the Contracts.

Adcon in turn stated, "*[Your] actions constitute a wrongful repudiation of the Subcontract, and we now accept that termination*" and submitted payment claims in April 2023 under both the Contracts. Taylor provided payment schedules to the April payment claims, which asserted the April payment claims were invalid.

Adcon subsequently submitted payment claims in May 2023.Taylor initiated proceedings on the basis that s 13(1C) of the SOP Act prevented Adcon from submitting payment claims after the April 2023 payment claims.

At trial, Adcon asserted that it had not terminated the Contracts and therefore, was not limited by s 13(1C) of the SOP Act because:

- Taylor's purported termination and reaffirmation of the purported termination were indistinguishable as they both related to the same breach, and
- as Adcon had already elected to affirm the Contracts, Adcon's later acceptance of Taylor's termination was not effective.

In issuing permanent stays against Adcon making adjudication applications or issuing further payment claims under the Contracts, the Court held that:

- Taylor's purported termination and reaffirmation of the purported termination were temporally distinguishable; and therefore, Adcon's later acceptance of the termination was effective.
- Adcon's May 2023 payment claims fell afoul of s 13(1C) of the SOP Act, because regardless of Taylor's claim that Adcon's April 2023 payment claims were invalid, those claims were valid, and the SOP Act only allows one payment claim after a construction contract is terminated.
- It is possible that a contractor could withdraw and resubmit a payment claim after a contract is terminated without breaching s 13(1C) of the SOP Act.

Key takeaways

The key takeaway from this case is that where a construction contract has been terminated, contractors should seriously consider their final payment claim, as they may only submit one payment claim after termination. However, it may be possible for a contractor to withdraw and resubmit its final payment claim.

LESSONS LEARNED FROM THE COLLAPSE OF CBL

Authors: Partner Tanya Wood, Duncan Cotterill

CBL Insurance Ltd was a licensed insurer, which suddenly went from being an up-and-coming company to the subject of a complex and highly publicised insolvency. A range of court proceedings have followed relating to insolvency, contractual interpretation, and court procedure, all of which will provide useful guidance for the future.

Background

CBL Insurance began its New Zealand operations mostly through insurance for builders' warranties. In the 1990s it expanded overseas, mainly in France. At the end of its operations, only one per cent of its business was New Zealand based, and CBL Insurance was primarily a reinsurer.

CBL Insurance was a wholly-owned subsidiary of CBL Corporation Ltd. CBL Corporation was listed on both the New Zealand and Australian stock exchanges in October 2015. At the time share trading was halted in early 2018, it was valued at almost $750 million. As a licensed insurer, CBL had to comply with prudential solvency standards, and needed to hold sufficient reserves for future claims, in a context where a claim could be filed at any time within ten years of the end of the policy period. In 2017, European regulators started investigating the reserving levels of CBL's ceding insurers, and an investigation began in New Zealand. CBL Insurance was placed into interim liquidation in February 2018, and went into full liquidation in November 2018. CBL Corporation went into liquidation in May 2019.

As a result of the liquidations, the directors and the chief financial officer faced multiple claims from regulators, shareholders, and liquidators. These included:

- A claim by the Financial Markets Authority (**FMA**) for alleged failures to comply with continuous disclosure obligations and misleading and deceptive conduct.
- A claim by the FMA alleging false or misleading statements in documents for the initial public offering (**IPO**).
- Two separate class action proceedings brought by shareholders, alleging false or misleading statements in IPO documents, breach of continuous disclosure obligations, and misleading and deceptive conduct.
- Claims by the liquidators of CBL Insurance and CBL Corporation for breach of directors' duties.
- Criminal charges by the Serious Fraud Office (**SFO**) against former officers of CBL.

The CBL proceedings have traversed a broad spectrum of legal issues and are likely to result in judgments, particularly in the FMA proceedings, which may provide a useful precedent on the FMA's powers and directors' liability under the *Financial Markets Conduct Act*. In addition, there have been a number of interlocutory hearings that have provided useful guidance on other matters, often unrelated to the subject matter of the substantive proceedings.

Powers of an interim liquidator

One of the initial decisions in the CBL proceedings relates to the role of an interim liquidator. The primary role of an interim liquidator is to preserve the status quo. In this case, the interim liquidators sought directions from the High Court to allow them to enter into a compromise with CBL's largest creditor, however Justice Courtney, in *Re CBL Insurance Ltd (in liq)* [2019] 2 NZLR 262, decided that this was beyond the scope of the interim liquidators' powers. The agreement would have the effect of crystallising the value of the creditor's claim and compromising the debt, both of which should be actions of the liquidator, not an interim liquidator.

Interim liquidations are not a regular occurrence, so this decision gives some welcome guidance on the extent of an interim liquidator's powers.

Listing Rules and interim liquidations

Before being placed into liquidation, CBL Corporation was in voluntary administration. During that time, it was still officially listed on the New Zealand Stock Exchange. The FMA sought rulings on whether the disclosure obligations imposed by the Listing Rules continue to apply to a company in voluntary administration, and, if so, whether they are discharged by the voluntary administrator complying with the periodic reporting obligations imposed on voluntary administrators by the *Companies Act 1993*.

Justice Venning held, in *Financial Markets Authority v Jackson* [2018] NZHC 2052; [2019] NZCCLR 23, that an administration puts a freeze on trading in the company's shares: shares in the company may not be transferred and the rights or liabilities of a shareholder cannot be altered. The purpose of the continuous disclosure obligations is to provide the market with material information relating to the issuer to preserve the integrity of the market. Since a company in administration is not able to participate in the market, the disclosure obligations are not vital. The Judge decided that the continuous disclosure obligations are suspended when a listed issuer (of debt or equity securities) is placed into voluntary administration. Instead, the disclosure and reporting obligations of an issuer in administration are replaced by those contained in the *Companies Act 1993*.

Priority of proceedings

When multiple proceedings relate to the same subject matter, the order in which they are dealt with can be important.

The Defendants (CBL's directors and CFO), and the shareholders, sought a joint trial to deal with liability issues for both the FMA and the shareholder proceedings. This would have resulted in one trial covering liability in four proceedings, dealing with the nature, extent and timing of the contraventions alleged. Evidence would relate to all four proceedings, and one liability judgment could be issued on all claims. Quantum and penalties could then be dealt with later, if needed.

Justice Gault, in *Livingstone v CBL Corporation Ltd (in liq)* [2022] NZHC 1734, decided that:

- there was a reasonable degree of commonality between the two sets of proceedings, particularly because this was not a case where there were different threshold assessments in the different proceedings requiring different evaluations of the evidence
- there is no principle that the FMA is entitled to any priority in the order of hearings
- although the pecuniary penalty hearing in the FMA proceedings need not await determination of compensation to be paid to shareholders, compensation that has already been paid (voluntarily or otherwise) is a mandatory consideration for the Court in determining the appropriate quantum of pecuniary penalties, and
- if the proceedings were not heard together there would be a risk of inconsistent findings.

Justice Gault therefore decided that the FMA and shareholder proceedings would be heard together.

Claims against overseas insurers

One of the shareholders' early applications centred around the ability to claim directly against CBL's insurer under s 9 of the *Law Reform Act 1936*. This section creates a statutory charge in favour of third-party claimants on monies that become payable by an insurer to an insured in relation to the liability of the insured to the claimants. Its purpose is to overcome the unfairness that arises when insurance proceeds are paid to the general pool of creditors of an insolvent insured rather than to the party who had suffered the loss to which the policy responded.

CBL claimed that its policies were underwritten and administered by entities having their places of business overseas. However, there was evidence that one of the insurers, while based in London, also had an office in New Zealand. All of this evidence was hearsay, as the insurers were not before the Court.

Justice Lang, in *Livingstone v CBL Corporation Ltd (in liq)*, [2021] NZHC 755, confirmed the position that s 9 does not have extraterritorial effect. In the future, it may not be as easy for insurers to claim that they are based out of New Zealand and therefore avoid the effects of s 9.

Claims against professional advisors

The proceedings brought by the liquidator of CBL Insurance involved claims against former directors and officers of CBL, and also its professional advisors, Pricewaterhousecoopers (PWC), and an employee and a partner of PWC. A PWC employee, and a partner, had acted as CBL's appointed actuary, a position required by the *Insurance (Prudential Supervision) Act 2010* (**IPSA**). There were two relevant provisions in PWC's terms of engagement:

- a limitation of liability clause, limiting liability to five times the fees, and
- an agreement that the client relationship is with PWC and that claims will not be brought against any employees or partners of PWC.

The claim was the first to determine whether any duties under IPSA gave right to a private right of action. Justice Gault, in *CBL Insurance Ltd (in liq) v Harris* [2021] NZHC 1393 *(a strike-out application), decided that "the IPSA statutory scheme does not indicate a legislative intention that a licensed insurer has a private action for breach of statutory duty against its appointed actuary. The IPSA regime does not create a cause of action for breach of statutory duty by a licensed insurer against its appointed actuary."*

Justice Gault also determined that there was nothing in IPSA that implied that appointed actuaries would be prohibited from agreeing with the licensed insurer to limit their civil liability to the insurer, whether for breach of contract or negligence. The provisions in the engagement letter were upheld, and the claims against the employer and partner were struck out, while the claim against PWC was limited by the liability cap. This case has proven useful guidance, in particular on the application of limitation of liability clauses.

Class actions

Until relatively recently, class actions were rare in New Zealand. Although development of a Class Actions Act is now under consideration, the current method for bringing a class action claim is to rely on the High Court Rule for "representative proceedings". The procedural details of class action litigation, including whether a class should be opt-in or opt-out, are determined on a case-by-case basis.

Previous class action litigation often resulted in lengthy skirmishes between parties on the procedural aspects, often being appealed to the Court of Appeal and then to the Supreme Court, taking years before the substance of a claim can be dealt with. Interestingly the CBL class action orders were resolved without the need for court intervention, despite circumstances where there were two separate (but potentially overlapping) actions from shareholders.

There have been a number of cases in New Zealand outlining the criteria for representative orders, which no doubt assisted in the agreement reached in the CBL class actions.

Directors' duties

Breaches of directors' duties have been a hot topic in New Zealand in recent years, with the Supreme Court's decision in *Madsen-Ries (as liquidators of Debut Homes Ltd (in Liq)) v Cooper* [2021] 1 NZLR 43 and the pending Supreme Court decision in the *Mainzeal* litigation (on appeal from the Court of Appeal's decision of *Yan v Mainzeal Property and Construction Ltd (in liq)* [2021] 3 NZLR 598).

Debut Homes decided that a breach of directors' duties will occur by continuing to trade where a director knows, or ought to know, that continued trading will result in a shortfall to creditors and the company is not salvageable. The Supreme Court said that:

> *"it is not legitimate to enter into a course of action to ensure some creditors have a higher return where this is at the expense of incurring new liabilities which will not be paid. In other words, it is not legitimate to 'rob Peter to pay Paul'."*

The Supreme Court also confirmed that the fiduciary duty to act in the company's best interests is subjective. However, where, in an insolvency or near insolvency situation, a director fails to consider the interests of all creditors, there will be a breach.

In *Mainzeal*, the Court of Appeal said when a company enters troubled financial waters, an on-going "sober assessment" as to the company's likely future income and prospects is required. If, following that sober assessment, a return to solvency is unlikely, directors must cease trading or follow the formal mechanisms in the Act, including taking steps to appoint an administrator.

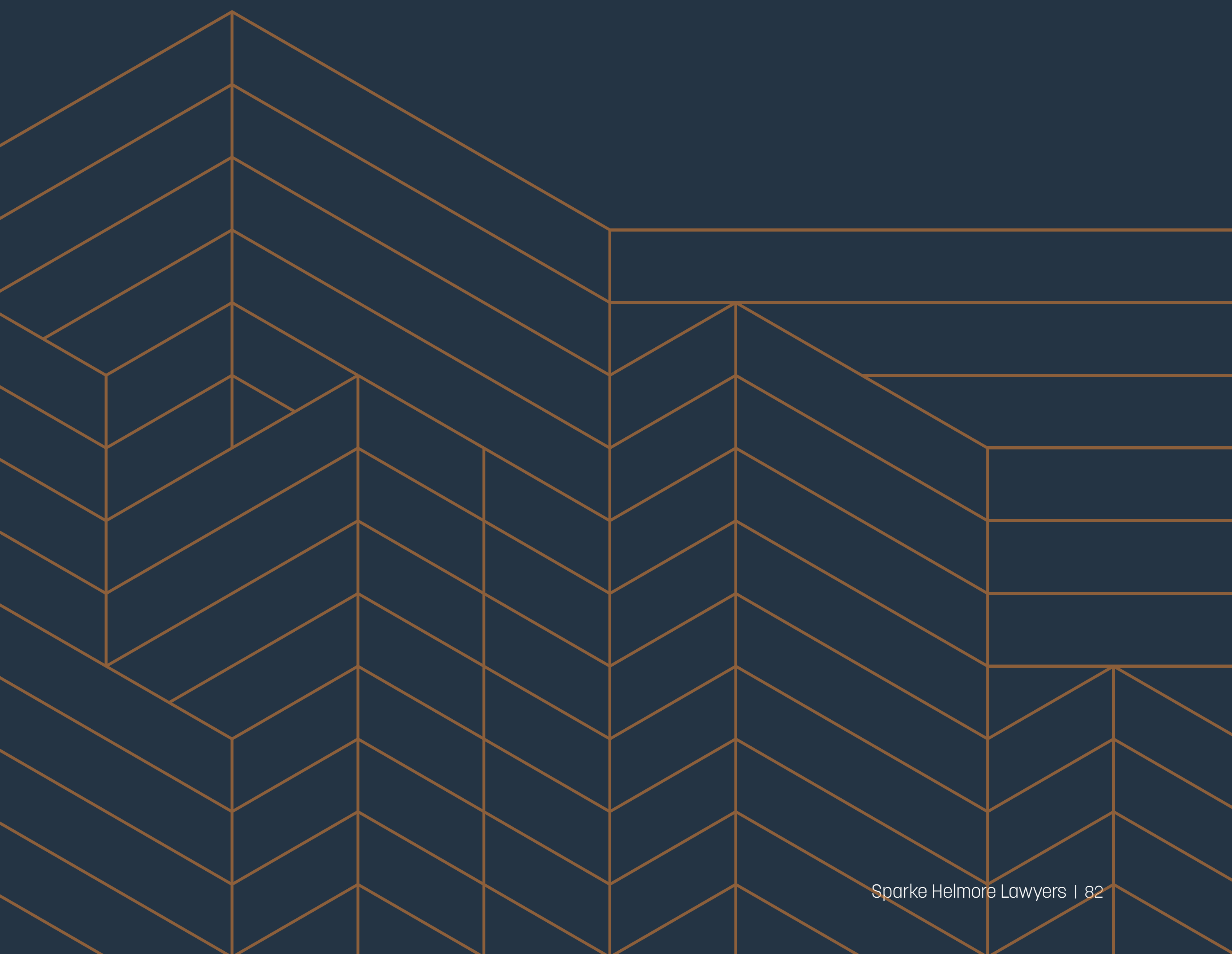
The Supreme Court's decision in *Mainzeal* is eagerly awaited, and the legislative review called for by the Court of Appeal in that case may still happen.

The extent to which the CBL proceeding provide further guidance remains to be seen. It is safe to say however that the current economic climate in New Zealand is bound to generate a number of construction related cases, in particular the liability of directors of failed companies.

Breaches of directors' duties have been a hot topic in New Zealand in recent years.

PART FOUR
COMBUSTIBLE CLADDING

A number of significant combustible cladding decisions were handed down in 2023. Part Four includes a summary of two of those decisions. Other cladding developments will be reported on separately in early 2024.



COMPANY DIRECTOR PERSONALLY LIABLE FOR CLADDING COSTS

Author: Partner Kiley Hodges
Acknowledgement: Sophie Little

Cladding Safety Victoria (CSV) was established in 2019 to oversee cladding rectification works throughout Victoria. Among other things, CSV provides grants of financial assistance to owners corporations for the rectification of external wall combustible cladding of eligible higher-risk, class 2 residential apartments.

Section 137F of the *Building Act 1993* (Vic) (**Building Act**) gives the State of Victoria the right to recover payments made by CSV from companies or their officers[1] responsible for the installation or use of non-compliant or non-conforming cladding.

Owners Corporation 1 Plan No PS 707553K and Ors v Shangri-La Construction Pty Ltd (ACN 130 534 244) and Anor [2023] VCC 1473 is the first successful recovery action against a company director for rectification costs incurred by CSV.

Facts of the case

Shangri-La Construction Pty Ltd (**Shangri-La**) constructed a residential apartment complex in Victoria (**Development**) using RMAX Orange Board combustible cladding (**RMAX**). The factual background, and parties involved, were as follows:

- In December 2013, Shangri-La and the developer, 290 Hawthorn Road Pty Ltd, entered into an agreement for the design and construction of the Development (**Contract**).
- In June 2014 a design meeting took place between Mr Obaid Naqebullah, principal of Shangri-La (**Director**), and various consultants including the fire engineer and Mr Tsaganas, the building surveyor. The Director's evidence was that this meeting related to the brand of cladding to use, and the consensus was that RMAX was the most appropriate.
- The Lacrosse fire occurred on 24 November 2014.[2]
- In December 2014 a building permit and amended permit were granted for the Development by Mr Tsaganas, which authorised the use of RMAX and departure from Deemed-to-Satisfy standards of the Building Code of Australia 2010 (**BCA**).
- RMAX was installed at the Development between December 2014 and 13 August 2015.

[1] Defined pursuant to section 9 of the *Corporations Act 2001* (Cth)
[2] *Tanah Merah Vic Pty Ltd v Owners Corporation No 1 of PS613436T and Ors* [2021] VSCA 72
[3] By building surveyor Sokratis Kromidellis

An occupancy permit for the Development was issued in September 2015.[3] In issuing this permit, the building surveyor relied on letters from the Director confirming that the Development had "*met all Fire Engineering requirements as per the BCA and consultants design*".

The Grenfell Tower fire occurred on 14 June 2017.[4]

The Director did not know RMAX was problematic or inappropriate until "*2016 or 2017*".

A building audit conducted in November 2019 identified extensive use of RMAX throughout the Development[5] and recommended its removal and replacement.

In March 2020 a local council order required removal of the RMAX and in November 2020 the Owners Corporation received funding from CSV for cladding rectification works.

Shangri-La went into voluntary liquidation in March 2023.

Pursuant to the rights of subrogation outlined in s 137F of the Building Act, the State of Victoria brought proceedings against the Director, alleging that Shangri-La breached the Contract, *Domestic Building Contracts Act 1995* (Vic) and BCA as the use of RMAX was not suitable and did not comply with legislation.[6]

Defence

The Director relied on the following arguments in defence of the claim against him:

- He did not know that RMAX was a non-compliant or non-conforming external wall cladding product at the time of installation.
- In approving the use of RMAX, he relied upon guidance from the relevant building surveyor and fire engineer.
- He was therefore entitled to rely on the defence in s137F(4), that if an act or omission by an entity occurred without the knowledge or consent of an officer of the entity, a right or remedy is not enforceable against the officer.
- Section 137F does not apply retrospectively.

Judge's findings

His Honour Judge Macnamara made the following findings:

- The application of s 137F cannot be limited in the manner contended. If this was to occur, it would serve no purpose at all.
- The Director's knowledge that RMAX was being used was sufficient to exclude him from the benefit of the s137F(4) defence. It did not matter that he did not know the product was non-compliant at the time of approval and installation. His Honour considered that this interpretation advances the purposes of the *Cladding Safety Victoria Act 2020* (Vic); whereas the construction advanced by the Director does not.
- The Director was ordered to pay the State of Victoria the sum of $1.2 million for rectification costs.

Implications

We expect the Director to take further steps in these proceedings, either by way of appeal or claims against other parties. We will monitor the developments with interest.

Meanwhile, company directors and officers should pay close attention and consider appropriate risk management steps. Some comfort can be taken by officers in classes that the Judge considered Parliament intended to afford immunity:

- non-executive directors such as a building company's solicitor or accountant who sit on the board to bring their legal or accounting expertise to the table
- company secretaries who devote their time to office administration, keeping or supervising accounts or accounting systems, payroll issues and such
- executive directors or non-director executives involved in non-building aspects of a company's operations for instance, a marketing manager or someone devoted entirely to the raising of finance, and
- executive directors or senior executives tasked to manage or supervise particular projects, which are not affected by the cladding issue.

[4] https://www.grenfelltowerinquiry.org.uk/
[5] The audit was conducted by Mr Stephen Kip of SKIP Consulting Pty Ltd
[6] The proceedings, which have a "*long and tortuous history*" (*Owners Corporation & Ors v Shangri-La Construction & Anor (No 2) [2023] VCC 655*) were originally commenced by the unit owners and Owners Corporation in the Victorian Civil and Administrative Authority (VCAT) against Shangri-La. Various orders were made by VCAT which culminated in a change of parties and transfer to the County Court of Victoria.

CLADDING CASE OUTLINES DEVELOPMENT IN COURTS' APPROACH TO DEFECTIVE BUILDING CLAIMS

Author: Partner Kiley Hodges

In *Owners SP 92450 v JKN Para 1 Pty Limited [2023] NSWCA 114*, the NSW Court of Appeal recently clarified that defendants, including builders and developers, bear the onus of proving that rectification costs are unreasonable. While the decision related to removal and replacement of combustible cladding, the principles can be applied more broadly to claims for rectification of building defects.

Background

JKN Para 1 Pty Ltd (**JKN**) contracted with Toplace Pty Ltd (**Toplace**) to design and construct a 28-storey mixed residential, commercial and retail tower in Parramatta NSW. The external cladding was constructed with Vitrabond FR aluminium composite panels (**ACP**) manufactured by Fairview Architectural Pty Ltd (**Fairview**).

After the interim occupation certificate was issued, Fire & Rescue NSW (**FRNSW**) provided a Final Fire Safety report to the certifier recommending that, in light of the "*worldwide spate of fires involving ACPs burning rapidly to the roof of multi storey buildings*", the ACPs be certified compliant with an internationally recognised fire protection listing for full scale façade tests. FRNSW requested written confirmation once the necessary rectification works had been completed. A final occupation certificate was issued without this certification.

Claim

Owners SP 92450 (the **Owners Corporation**) alleged that JKN and Toplace breached statutory warranties in the *Home Building Act 1989* (NSW). Namely:

- the cladding did not comply with the Home Building Act or the Building Code of Australia (**BCA**) as it applied in 2013
- the cladding was not good and suitable material as it was combustible, and/or
- the dwellings were not reasonably fit for occupation because they were combustible.

The Owners Corporation sought damages for the cost of removing and replacing the cladding, which the parties agreed at $5 million. This involved complete replacement of all ACP.

The critical issue in the case was whether complete replacement of all ACP was necessary and appropriate, or whether another (less costly) rectification method could be utilised, and who bore the onus of proof.

Expert evidence

The BCA required the external walls of the building to be non-combustible. Compliance with this requirement could be achieved through the "Deemed-to-Satisfy" (**DtS**) provisions of the BCA or through an "Alternative Solution" that complied with the performance requirements of the BCA (**Alternative Solution**), or a combination of both.

Expert evidence was obtained as to BCA compliance, combustibility of the ACP and rectification methods, which would satisfy the DtS provisions or provide an Alternative Solution.

The parties' joint expert[1] recommended that the ACP be removed and replaced with a product that had been tested and attained a "non-combustible" criteria

or had been deemed non-combustible in accordance with the DtS provisions of the BCA. He did not believe any Alternative Solutions were available.

The Owners Corporation's expert[2] stated that, whilst a performance solution could have been carried out in 2013, certain information was not available to allow a comprehensive performance solution to be undertaken. This included, for example, test reports outlining the calorific value of the ACP and a lack of commercially available cavity barriers in Australia.

JKN and Toplace's expert[3] was of the view that the as-built building, without modification, was capable of being certified at the relevant time by way of an Alternative Solution. Whilst the expert did not identify what an Alternative Solution would be, he gave evidence of an assessment method to be adopted for an Alternative Solution to comply with the performance requirements of the BCA.

The absence of any recommendations as to an appropriate Alternative Solution was significant.

Trial judge

The trial judge found that the cladding did not comply with the DtS provisions and was not compliant with the BCA by way of an Alternative Solution. Nevertheless, his Honour found no breach of statutory warranties and declined to award reinstatement damages on the basis that the Owners Corporation had not established that an Alternative Solution 'could not then or now be performed' and that the evidence did not show the cladding was combustible for the purposes of the BCA in a general sense.

The trial judge also found:

- The Owners Corporation's evidence involved a degree of speculation to steps that were not taken to develop a full Alternative Solution.
- JKN and Toplace's evidence did not establish the functional equivalence of an Alternative Solution to the DtS provisions of the BCA.

Appeal

On appeal, JKN and Toplace conceded that the statutory warranty in the *Home Building Act* had been breached.

The central issues were whether the trial judge erred in declining to award reinstatement damages on the basis that the Owners Corporation had not established that an Alternative Solution 'could not then or now be performed', and who bore the evidentiary onus of displacing the prima facie rule for assessing damages as the cost of reinstatement.

The Court of Appeal found that JKN and Toplace bore the onus of proving that complete reinstatement would be unreasonable by proving an Alternative Solution was available prior to issue of the construction certificate or alternatively, is now available.

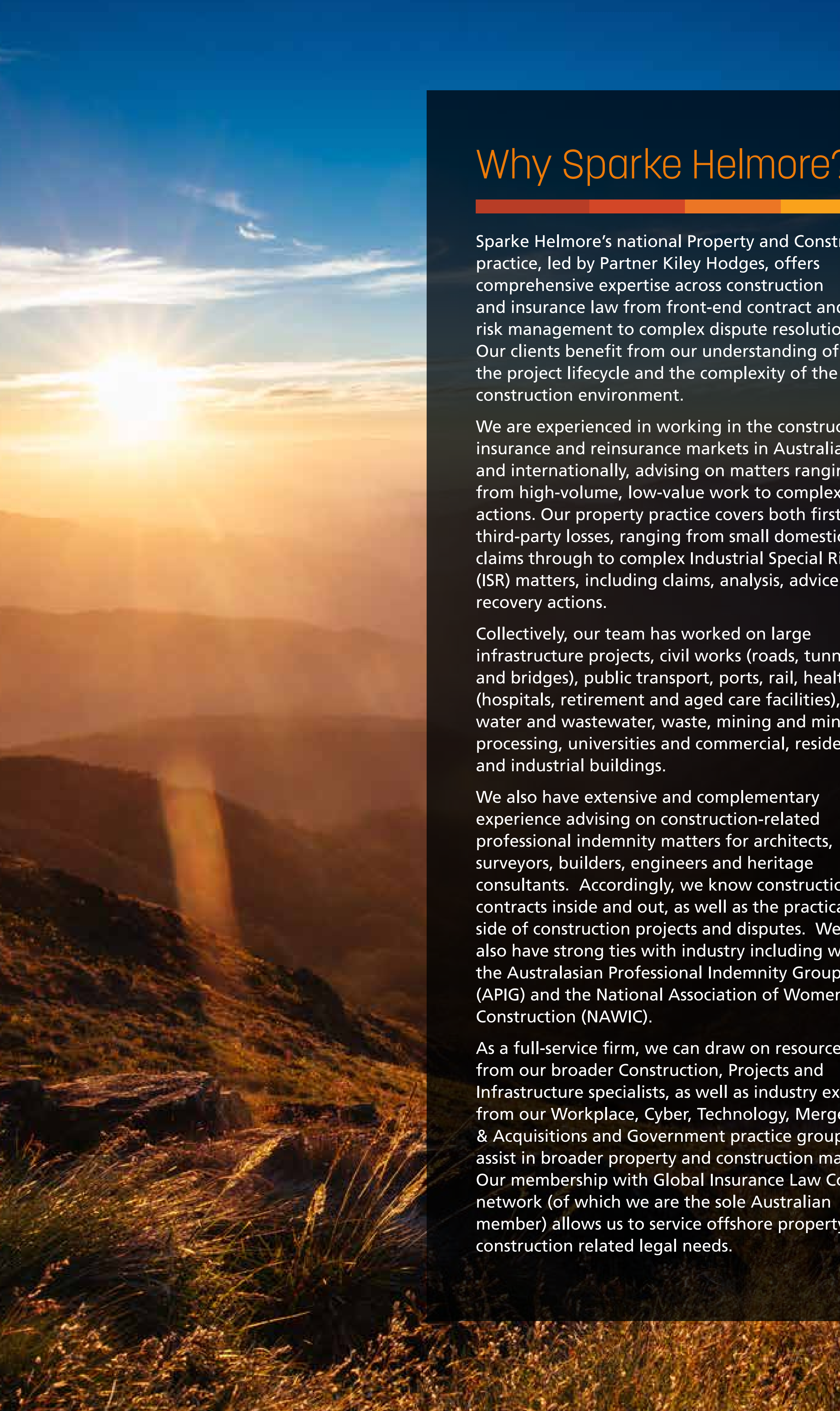
JKN and Toplace were not able to establish that the costs of complete reinstatement would be unreasonable, and they were therefore ordered to pay the agreed rectification cost of $5 million.

Implications

This decision provides important clarity as to the nature of evidence required in defective building cases.

Defendants, including builders and developers, are required to prove that alternate (usually less costly) rectification methods comply with the BCA, are effective, and do not require Plaintiffs to carry unreasonable risks of failure.

[1] Mr Mark McDaid of MCD Fire Engineering Pty Ltd, appointed by the parties pursuant to court order
[2] Mr Allan Harriman of Jensen Hughes
[3] Mr Mardiros Tatian



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

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

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