

Construction Update

for the Insurance industry

MAR
2025

ISSUE 3



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WELCOME



Kiley Hodges

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

I am delighted to present the third issue of the Sparke Helmore Construction Update for the Insurance industry. In this edition, we've adopted a shorter format, focusing on a few key topics.

We begin with a discussion on the **state of the industry**. While there are challenges and bumps in the road, there is still a significant amount of work in the pipeline, and the future looks positive. The biggest challenge is getting that work done, so training programs are being introduced, and increasing productivity remains a key focus area.

Next, we comment on the **race to renewables**, highlighting the wealth of developments in the renewable energy sector.

In the **Building Reform** section, we outline key legislative and regulative changes implemented across the country. These reforms aim to enhance the quality of construction work, boost consumer confidence, and achieve net-zero emissions in the built environment by 2050. The proposed new risk-based Building Product Registration Scheme will represent a significant change.

The **Non-Compliant Building Products** section provides an update on cladding rectification programs and claims, which are largely coming to an end, with the exception of those in Victoria.

We also provide brief updates on the state of **proportionate liability and disclosure** in an insurance context.

I hope you find this issue informative and useful. If you would like any further information on the issues discussed, please contact me or any of the team listed on the last page.

PART ONE

STATE OF THE INDUSTRY

Australia's construction industry continues to navigate challenges due to rising inflation, increasing material costs, and persistent labour shortages. In the 2024 financial year, builder insolvencies continued to grow, with 2,975 construction companies entering external administration nationally, reflecting the ongoing difficulties facing the industry.¹

Despite these pressures, construction activity in Australia is expected to reach \$299 billion in the 2025 financial year, although growth is expected to slow to a modest 0.9%.² The September 2024 quarter saw a 3.3% increase in engineering construction work,³ driven by public sector projects, which grew by 5.5% in the same period. These projects include large-scale transport projects and energy infrastructure that support the transition to clean, renewable energy.

The Australian Government's commitment to addressing the housing crisis has also stimulated industry activity, with 43,247 new homes commencing construction in the first three months of the National Housing Accord.⁴ This surge has contributed to growth in the construction industry, despite unfavourable economic conditions. However, concerns remain about the industry's capacity to meet demand, particularly given the ongoing labour shortages.

To address these shortages, the Federal Government is investing over \$90m to increase the number of skilled workers in the construction and housing sectors. The investment in Fee-Free TAFE training places and pre-apprenticeship programs is designed to eliminate cost barriers to education and training and increase the pipeline of workers.⁵

Reforming the construction industry and improving its public perception has been a priority at many levels, including within the Victorian branch of the Construction Forestry Maritime Employees Union (**CFMEU**). An independent inquiry into the Victorian branch was initiated following concerns about infiltration by bikie and organised crime groups, which led to widespread criminal and corrupt conduct.⁶

On 23 August 2024, the Construction and General Division of the CFMEU was placed into administration, with Mark Irving KC appointed as administrator to manage its financial, legal, and business affairs.⁷ This appointment is seen by some as a positive first step in addressing illegal activity in the construction sector and providing an opportunity for widespread reform and renewal.⁸ However, the administration has faced challenges, with a High Court ruling on the appointment expected shortly.⁹

The Australian Securities & Investment Commission (**ASIC**) has reinforced its commitment to holding companies and their boards accountable with the release of its 2025 enforcement priorities.¹⁰

¹ ASIC, "Annual ASIC insolvency data reveals increase in companies failing", 25 July 2024 (Annual ASIC insolvency data reveals increase in companies failing | ASIC)

² ACIF, November 2024 Forecasts Released – Residential Construction to Bounce back November 2024 ACIF Forecasts Released – Residential Construction to Bounce Back - Australian Construction Industry Forum

³ Building and construction | Australian Bureau of Statistics; Engineering construction keeps the economy moving | Master Builders Association

⁴ Positive signs in new home construction but still a long way to go | Master Builders Association

⁵ Growing Australia's construction workforce to build more homes | Treasury Ministers

⁶ CFMEU in 'cycle of lawlessness' after bikie and organised crime infiltration, probe finds | Australian trade unions | The Guardian

⁷ Role of CFMEU administrator - Fair Work Ombudsman

⁸ ACIF Media Release on CFMEU allegations 17 July 2024.pdf

⁹ Update on the CFMEU administration | Master Builders Association; CFMEU: Will the construction union be cleaned out by administrator Mark Irving, KC?; Case S113/2024 – High Court of Australia

¹⁰ ASIC enforcement priorities | ASIC

Directors should be particularly vigilant about greenwashing and misleading ESG claims, as these issues are now high on ASIC's priorities list. More information about greenwashing and ESG claims can be found in our [2023 Construction Update](#).

The 2025 updates to the National Construction Code (**NCC**) reflect the government's focus on sustainability and climate resilience. Climate concerns were at the forefront of the 2024 industry reforms, with ongoing legislative efforts to integrate climate resilience, housing policy, and quality standards.

Increased collaboration between Ministers responsible for Energy and Climate Change and Building reflects a strategic and holistic approach to addressing climate change challenges within Australia's built environment. This collaboration supports the Australian Government's commitment to achieving net zero emissions in the built environment by 2050 and reducing emissions by 43% by 2030.¹¹

The introduction of climate resilience as a specific objective of the Australian Building Codes Board (**ABCB**) from 2025 gives the ABCB a clear mandate to develop future NCC requirements aimed at reducing the impact of climate change and natural disasters on housing and other critical community facilities. This marks a critical moment of transformation to ensure that Australia's built environment is sustainable and resilient into the future.

¹¹ Joint Statement from the Energy and Climate Change Ministerial Council and Building Ministers' Meeting 23 August 2024 | Department of Industry Science and Resources



PART TWO

RACE TO RENEWABLES HEATS UP

Since the Australian Government passed the *Climate Change Act 2022* (Cth), which legislates its greenhouse gas emissions reduction targets,¹² there have been numerous developments in the renewable energy sector.

These commitments, in conjunction with the country's rapidly aging coal generators, have led to various federal, state and territory government programs aimed at accelerating the transition to renewable energy.

However, this progress is being threatened by complexities and obstacles that come with an energy transition. Key issues include the need for extensive transmission lines to connect rural renewable farms with urban consumers, the necessity for effective renewable power storage, a constrained grid, slow planning and environmental assessment processes in some jurisdictions, as well as higher costs and tighter markets for equipment and labour.



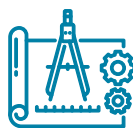
Trends

Australia is intensifying efforts to meet its 2030 reduction goal. While oil and gas continue to make up the largest share of committed projects,¹³ renewable energy sources are steadily increasing their contribution to the nation's energy supply.¹⁴

In June 2024 the Australian Energy Market Operator (**AEMO**) released its 2024 Integrated System Plan¹⁵ (**ISP**) for the National Electricity Market, forecasting that all of Australia's coal power stations will shut down before 2040.¹⁶

Consequently, the rapid development of adequate replacement capacity is critical.

However, the Clean Energy Council's 2024 report revealed that investment in renewable energy plants significantly slowed down in 2023 compared to 2022.¹⁷



Policy and projects

Federal Government

In response to the reduction in large-scale investments, the Australian Government announced¹⁸ an expansion of its Capacity Investment Scheme (**CIS**) in late 2023. The CIS aims to encourage the transition to renewable energy generation by underwriting large-scale renewable generation and storage projects. This response appears to have been successful, as investment commitments in 2024 significantly exceeded those of 2023.¹⁹

In late 2024, the CIS awarded funding for Australia's largest-ever renewable energy tender. Comprising 19 renewable projects,²⁰ aimed at bridging the gaps left by retiring coal power stations.

The other big-ticket item on the federal government's renewables policy is the Rewiring the Nation (**RTN**) program. This program intends to address one of major challenges in Australia's renewables transition—the need for almost 10,000km of new and upgraded transmission lines by 2050.²¹ RTN is investing \$20 billion to modernise the electricity grid and deliver new and upgraded transmission infrastructure.²²

¹² Net zero emissions by 2050 and a reduction in greenhouse gas emissions to 43% below 2005 levels by 2030: *Climate Change Act 2022* (Cth) s 10(1).

¹³ Global energy transition drives a new wave of investment in Australian resources | Department of Industry Science and Resources

¹⁴ Comprising 39.4% of the supply in 2023, up from 35.9% in 2022: Clean Energy Australia 2024 Report p 11.

¹⁵ 2024 Integrated System Plan for the National Electricity Market | AEMO

¹⁶ 2024 Integrated System Plan for the National Electricity Market | AEMO

¹⁷ Clean Energy Australia 2024 Report p 3.

¹⁸ Delivering more reliable energy for all Australians | Ministers

¹⁹ Renewables Projects Quarterly Report Q3 2024 | Clean Energy Council

²⁰ Australia's clean energy transformation boosted by 19 projects - DCCEEW

²¹ 2024 Integrated System Plan for the National Electricity Market p 59.

²² Rewiring the Nation - DCCEEW

State and territory governments

In addition to federal initiatives, state and territory governments are enacting various plans to accelerate the transition to renewables.

The **Queensland** Energy and Jobs Plan²³ outlines Queensland's strategy to modernise the state's electricity system with investments in wind, solar, pumped hydrogen assets, additional storage and firming technologies, and transmission and distribution infrastructure.

The **New South Wales** Infrastructure Investment Objects (IIO) Report²⁴ details a development pathway for the next 20 years, including tender plans for the next decade.

The **Victorian Government** is investing in renewable energy projects, including \$1 billion for the State Electricity Commission to deliver 4.5 gigawatts of renewable energy, \$540 million to establish six Renewable Energy Zones, \$84 million to accelerate the uptake of zero-emission vehicles, and \$42 million for the installation of 100 neighbourhood batteries.²⁵

South Australia aims to reach 100% net renewables by 2027 through three key government projects: The Hydrogen Jobs Plan to see the construction of a world-leading hydrogen power station; Priority EnergyConnect that will build a new energy interconnector between SA and NSW to allow green energy produced in SA to be exported to NSW; and SA's Virtual Power Plant that will develop a network of up to 50,000 solar and Tesla Powerwall home battery systems.²⁶



Wind and solar

Wind and solar currently dominate Australia's renewable energy landscape. As the global economy begins to recover from COVID-19 supply chain disruptions, the capital costs associated with large-scale photovoltaic (PV) solar systems have decreased for the second consecutive year, making solar energy more accessible and economically viable for both large-scale projects and rooftop installations.²⁷

On 28 March 2024, the Federal Government announced a \$1 billion investment in the new Solar SunShot Program. This program is intended to enhance innovative solar PV manufacturing facilities across Australia's solar supply chain, support the commercialisation of Australian solar PV innovations, and strengthen the country's solar PV supply chains.²⁸

In the Federal Budget 2024, the Australian government allocated substantial funds to wind and solar initiatives including \$1.2 billion for large-scale solar farms and rooftop solar installations, and \$900 million to the development of wind farms.

Wind power experienced steady growth in 2024, despite rising costs.²⁹ There are over 300 wind farm projects across Australia that are either currently operational, under construction, or proposed.³⁰ Notably, the commitment to expanding both onshore and offshore wind energy is evident in recent investments and project announcements. However, only seven new wind farms were commissioned in 2023 and there were no financial commitments to utility-scale wind projects during that year.³¹

The Federal Government has proposed six offshore wind zones around Australia, located off the coast of New South Wales, Victoria, and Western Australia.³² While New South Wales is facing significant licensing issues, Victoria is the State to watch. If the recipients of offshore wind feasibility licences in Victoria's Gippsland region proceed, they could have the potential to produce more electricity per year than the entire State of Victoria did in 2023.³³

²³ Queensland Energy and Jobs Plan

²⁴ Infrastructure Investment Objectives Report December 2023 | AEMO Services

²⁵ Investing in a sustainable future | vic.gov.au

²⁶ Leading the green economy | Energy & Mining

²⁷ CSIRO GenCost 2024-25 Consultation draft report.

²⁸ Solar Sunshot - Australian Renewable Energy Agency (ARENA)

²⁹ Clean Energy Australia 2024 Report

³⁰ Wind Farms In Australia | State-By-State Guide - Canstar Blue

³¹ Clean Energy Australia 2024 Report

³² Australia's offshore wind areas - DCCEEW

³³ Facebook post of Chris Bowen MP on 17 July 2024

Storage

Large-scale energy storage has emerged as a critical component of Australia's renewable energy transition. It plays a key role in integrating intermittent energy sources, such as wind and solar, into the grid.

Government and private investment in battery projects reflect this imperative. In 2023, there was \$4.9 billion in new investments in large-scale storage, up from \$1.9 billion in 2022.³⁴ The declining costs of battery storage further enhance its viability.³⁵

The scale of battery storage projects in Australia is growing rapidly. Currently, the largest fully commissioned battery in the country is the 450 megawatt hour (MWh) Victoria Big Battery near Geelong. This project will soon be surpassed by the 1680 MWh Waratah Super Battery in New South Wales, followed by a series of three 2,000 MWh batteries that are also under construction. Neoen is set to build Australia's largest battery, advancing plans for a 3,600 MWh battery in South Australia due for completion in October.³⁶

Similar to solar panels, batteries have a relatively short operational lifespan of approximately 20 years. This complicates Australia's 2050 net zero target, as batteries installed this decade will require replacement in the 2040s.

Hydrogen

The 2024 National Hydrogen Strategy³⁷ aims to establish Australia as a global leader in hydrogen production. The strategy outlines a trajectory for Australia to produce sufficient volumes of hydrogen at competitive prices to attract demand from both domestic and international buyers.

Australia has the world's largest pipeline of hydrogen projects, with an estimated value exceeding \$225 billion.³⁸ The majority of these projects are located in Queensland and Western Australia.³⁹

With its deep-water port, close proximity to Asia, and manufacturing capabilities, Townsville in North Queensland is positioned to become a leading low-cost green hydrogen producer by the end of the decade.⁴⁰ Its SunHQ Hydrogen Hub,⁴¹ which was set to be commissioned in late 2024, will be one of Australia's largest fully integrated, renewable hydrogen production and refuelling facilities.

Nuclear

The debate over nuclear energy in Australia continues, as nuclear power remains banned. A House Select Committee on Nuclear Energy was established in October 2024 to report by April 2025. The Federal Opposition has proposed building seven nuclear plants, but this idea faces opposition by the Federal Government, which has heavily invested in renewable energy generation projects.

The AEMO and the Climate Change Authority argue that nuclear energy is unviable and costly compared to renewable sources.⁴² The CSIRO's GenCost Report supports this view, highlighting high costs, lengthy construction times, and significant uncertainties associated with nuclear power.⁴³

The future of nuclear in Australia remains speculative, with potential shifts dependent on the outcome of the Federal election in May 2025.

Conclusion

The Australian renewable energy industry has experienced significant growth and development, though not without its challenges. As the 2030 target rapidly approaches, the coming years will be particularly interesting. The outcome of the Federal election could lead to substantial changes in the nuclear energy landscape in Australia.

³⁴ Clean Energy Report 2024 | Clean Energy Council

³⁵ CSIRO GenCost 2024-25 Consultation draft report.

³⁶ Battery Storage: Australia's current climate

³⁷ National Hydrogen Strategy 2024

³⁸ Growing Australia's hydrogen industry - DCCEEW

³⁹ Major projects report 2024

⁴⁰ Mission 2050: how Townsville is becoming a global renewable energy hub | State Development, Infrastructure and Planning

⁴¹ SunHQ Hydrogen Hub – HyResource

⁴² Submission to: Inquiry into nuclear power generation in Australia | Climate Council

⁴³ CSIRO GenCost 2024-25 Consultation draft report.

PART THREE

BUILDING REFORM

In 2024, a series of reforms were implemented at both state and national levels to enhance the quality of construction work and boost consumer confidence. These reforms align with the Federal Government's commitment to achieving net-zero emissions in the built environment by 2050, placing a strong emphasis on sustainability and climate resilience.

Several factors drove these reforms. Firstly, the findings of the 2018 Building Confidence Report by Peter Shergold and Bronwyn Weir, which investigated compliance and enforcement in the Australian construction industry.⁴⁴ Secondly, efforts by the ABCB to update the NCC addressing the concerns identified in the Building Confidence Report. Lastly, the National Housing Accord, which aims to construct 1.2 million new homes between 2024 and 2029.⁴⁵

Below is a summary of the primary steps taken in 2024 across all jurisdictions.



National Housing Accord

All jurisdictions have introduced measures to implement the National Housing Accord. However, the slow rate of progress has raised widespread concerns about the capacity of the industry to meet demand, especially in light of ongoing labour shortages. In response, the Federal Government has invested over \$90m to boost the number of skilled workers in the construction and housing sector through initiatives focusing on skills and training, employment and workforce, and workplace relations.⁴⁶

To help close the national skills gap and equip the construction industry with the necessary workforce to meet the increased housing demand, the Federal Government has committed an additional \$86.4m to support an extra 20,000 Fee-Free TAFE and VET places.⁴⁷ This initiative includes an estimated 5,000 pre-apprenticeship places over two years, starting from January 2025, to increase the pipeline of workers for the construction industry. However, this measure has faced criticism for excluding civil construction from the program.

The ABCB – traceability and climate resilience

Under the direction of Building Ministers, the ABCB proposed a Building Product Registration Scheme (**Scheme**) to address ongoing concerns regarding non-compliant building products and the use of counterfeit products.⁴⁸ This would involve creating a central, standardised register and mandatory product labelling.

If implemented, the Scheme would establish a risk-based designated products category. The ABCB, in consultation with governments and industry, would define designated products by assessing their uses, risk defects, structural integrity, and safety. Registration would be mandatory for products in the designated category, while other building products could be registered voluntarily. The Scheme also proposes a minimum information standard for all building products, presented in a standardised format, which includes evidence that the product complies with the NCC. The ABCB is currently preparing advice for Building Ministers incorporating feedback received during the consultation period.⁴⁹

⁴⁴ Peter Shergold and Bronwyn Weir, "Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia" (February 2018).

⁴⁵ Delivering the National Housing Accord | Treasury.gov.au

⁴⁶ Growing Australia's Construction Workforce to Build More Homes | Ministers' Media Centre

⁴⁷ Fee-Free TAFE - Department of Employment and Workplace Relations, Australian Government

⁴⁸ Proposed risk-based Building Product Registration Scheme - Australian Building Codes Board - Citizen Space

⁴⁹ Principles and scope of a Building Product Registration Scheme (Scheme)

The introduction of climate resilience as a specific objective of the ABCB from 2025 also gives it a clear mandate to develop future NCC requirements aimed at reducing the impacts of climate change and natural disasters on housing and other critical community facilities. This reflects a critical moment of transformation to ensure that Australia's built environment is sustainable and resilient into the future.

Changes to the NCC

The NCC is Australia's primary set of technical design and construction provisions for buildings. It established the minimum required level for the safety, health, amenity, accessibility, and sustainability of certain buildings. The ABCB, on behalf of the Australian Government and each state and territory government, is responsible for producing and maintaining the NCC.

In 2024, states and territories continued their phased adoption of the NCC 2022, with Queensland, Victoria and the ACT implementing the changes to residential energy efficiency standards.

The proposed updates to the NCC for 2025 were opened for public comment on 1 May 2024.⁵⁰ The draft changes include requiring new homes to meet enhanced insulation standards, glazing standards and condensation mitigation requirements, as well as stricter energy efficiency requirements that aim for new commercial buildings to be net-zero ready.⁵¹

Outcome of inquiry into insurers' responses to 2022 major flood claims

In October 2024, the House of Representatives Standing Committee on Economics released the outcome of its inquiry into insurers' responses to the major flood claims from 2022 in a report titled "Flood failure to future fairness".⁵² This report examined the three P's of flood insurance: policyholders, pooling, and preparation. The report made 86 recommendations including the registration of the General Insurance Code of Practice (**ICOP**) with the ASIC and making the ICOP enforceable through insurance contracts. The report also suggests strengthening building codes, regulations, and planning rules to improve the resilience of households and communities, enhancing consumer protection through better communication and support, and fostering greater investment in mitigation and resilience initiatives.⁵³

The Insurance Council of Australia (**ICA**) has confirmed its support for those recommendations that aim to reduce premiums, promote good customer outcomes and safeguard communities from future extreme weather events. The ICA is currently reviewing the report and engaging with its members regarding its findings. However, these recommendations have yet to be implemented.

⁵⁰ National Construction Code 2025 Public Comment Draft - Australian Building Codes Board - Citizen Space

⁵¹ PCD 2025 - Commercial building energy efficiency | ABCB

⁵² Flood failure to future fairness - Parliament of Australia

⁵³ List of recommendations - Parliament of Australia - Recommendations 8, 19, 20, 21, 73, 75.

New South Wales

Ahead of the NSW Building Commission's one-year anniversary, the new Building Commissioner, James Sherrard, emphasised a continued focus on implementing reforms that support strong regulation, enhance industry productivity, and protect consumers. These efforts aim to increase construction compliance and improve building quality.⁵⁴

Recently the NSW Government commissioned a review into the NSW Home Building Compensation Fund (HBCF) to evaluate issues related to business insolvencies in the building sector, assess the adequacy of the HBCF cover amount, consider future adjustments, and examine the impact on premiums.⁵⁵ The report is expected to be released soon.⁵⁶

Improving professional standards, safety, and consumer confidence, and promoting better construction outcomes across New South Wales were central to several reforms implemented in 2024. This is evident in the increase to the building bond payable by developers under the Strata Building Bond and Inspections Scheme raising it from 2% to 3% of the contract price.⁵⁷ Furthermore, a requirement was established for all engineers performing 'professional engineering work' be registered and comply with the Practice Standard.⁵⁸

Additionally, the NSW Government circulated a draft Building Bill 2024 (NSW) (**Draft Bill**) in late 2024. The Draft Bill seeks to enhance regulatory oversight and increase professional responsibility by expanding the list of construction industry professionals who require licencing, boosting insurance requirements, and expanding the statutory duty of care to protect consumers when defects do occur. These anticipated further reforms demonstrate the government's ongoing commitment to improving construction quality, consumer protection, and public confidence in the industry.

Victoria

Following the dissolution of the Victorian Building Authority (VBA) in March 2024 and the release of the VBA Report, which revealed ineffective handling of complaints and practitioner misconduct by the VBA,⁵⁹ the Victorian Government has announced plans and allocated funding for a new body, the Victorian Building and Plumbing Commission (VBPC). Legislation to enact this body will be introduced in 2025.

Other reforms include a new consumer protection policy targeting apartment buyers, who have often found themselves without recourse in cases of building defects. This policy improves inspection requirements, increases powers governing rectification orders, and improves financial protections for mid-to-high-rise apartment owners.⁶⁰

The Better Apartments Program, aimed at improving the quality of apartments living across the State, is also subject to updates following the Victorian Government's response to the Parliamentary Inquiry into Apartment Design Standards (**Inquiry**).⁶¹ In support of all 35 of the Inquiry's recommendations, the Victorian Government has allocated \$3.5 million towards its enforcement.

Queensland

The Commonwealth Government's review of infrastructure funding in 2023, along with subsequent changes to funding arrangements, led to delays in Queensland's project procurement and delivery. As a result, the works delivered were 11% less than predicted, with FY25 expected to deliver a 13% reduction. Despite these setbacks, the pipeline remains promising, valued at \$103.9 billion over the next five years, marking a 20% increase from 2023 estimates.⁶²

⁵⁴ NSW Government, "New construction watchdog hammers home priorities for Building Commission NSW", dated 5 December 2024, (New construction watchdog hammers home priorities for Building Commission NSW | NSW Government

⁵⁵ Review of the Home Building Compensation Fund Supporting Information (October 2024)

⁵⁶ Review into Home Building Compensation Scheme | Have Your Say

⁵⁷ *Strata Schemes Management Act 2015 (SSMA)*

⁵⁸ *Design and Building Practitioners Act 2020 (NSW)* ss 49, 50; Civil, electrical, fire safety, geotechnical, mechanical and structural.

⁵⁹ Bronwyn Weir, Frances Hall, 'Victorian Building Authority: The Case for Transformation' (Final Report, October 2024); Statement from VBA CEO & Commissioner Anna Cronin | Victorian Building Authority

⁶⁰ Increased building quality protections for Victorian homeowners | vic.gov.au

⁶¹ Department of Transport and Planning, State of Victoria, *Victorian Government Response to the Inquiry into Apartment Design Standards* (Final Report, 21 March 2024).

⁶² Queensland Major Projects Pipeline Report 2024, Queensland Major Contractors Association

The change in government in November 2024 brought significant changes, including the suspension of the Best Practice Industry Conditions (**BPIC**) implemented in 2023. This decision, aimed at addressing budget blowouts and productivity concerns, is predicted by Treasury to save up to \$17.1 billion over six years. However, this move has sparked debate, with unions expressing concerns about the potential impact on worker conditions and safety.

In an effort to reduce complexity and costs, the Queensland Government has simplified financial reporting requirements for building and construction contractors with a revenue up to \$30 million. These contractors now only need to provide special purpose financial statements.⁶³

Additionally, new legislative amendments have clarified the Project Trust Account (**PTA**) regime.⁶⁴ The PTA framework ensures that construction project funds are held for certain contracts, guaranteeing that subcontractors are paid from these funds. Contracts now can become eligible for a PTA if the original contract price increases by 30% or more when amended. However, the PTA regime has faced significant criticism from industry stakeholders who argue that it adds unnecessary complexity and administrative burdens.



Australian Capital Territory

The *Property Developers Act 2024* (ACT) was passed in July 2024, with provisions related to rectification orders now in force. However, the licensing regime for developers is yet to commence.

The ACT government has also introduced a registration scheme for civil, electrical, fire safety, mechanical, and structural professional engineers.⁶⁵ The NCC 2022's minimum energy efficiency ratings for all new residential constructions were also adopted in January,⁶⁶ reflecting the Territory's commitment to achieving net zero emissions by 2045.⁶⁷ These reforms ensure competency, safety, public confidence, and sustainability, akin to those measures implemented in other states.

South Australia

The South Australian Government has released its response to the 2023 recommendations from the Expert Panel responsible for reviewing the *Planning and Development and Infrastructure Act 2016* (SA). The Expert Panel review, following recommendations in the Building Confidence Report, focused on implementing new licensing and registration requirements and investigating the effectiveness of the building inspection scheme under the Act.⁶⁸

Of the Expert Panel's 113 recommendations, the State Government supported 63 in full, 13 in principle, and 36 in principle with further investigation. One recommendation was not supported. The Government expects the implementation to take 18 months, and will involve further investigations, guidance material and Practice Directions, as well as the preparation of a Code Amendment(s) and/or draft Regulations.

⁶³ Queensland Building and Construction Commission (Minimum Financial Requirements) Amendment Regulation 2024

⁶⁴ *Building Industry Fairness (Security of Payment) and Other Legislation Amendment Act 2024* (Qld).

⁶⁵ *Professional Engineers Act 2023* (ACT).

⁶⁶ National Construction Code (NCC) 2022 - Environment, Planning and Sustainable Development Directorate - Planning

⁶⁷ *Climate Change and Greenhouse Gas Reduction Act 2010* (ACT) s 6(1).

⁶⁸ Building and Construction Industry Review | YourSAy. The consultation period is now closed.

Western Australia

At the end of 2023, the Western Australian Government announced landmark reforms to the State's building laws, with new legislation to be drafted to improve the design, certification and construction of buildings.⁶⁹ Our initial comments on the announcement can be found [here](#).

These reforms will build on the existing State registration scheme for building engineers. From 1 July 2024, amendments to the *Building Services (Registrations) Act 2011 (WA) and Regulations* have aligned Western Australian's registration framework more closely with requirements in other Australian jurisdictions.⁷⁰ Under this legislation, building engineering contractors in Western Australia must be registered by the Building Services Board to carry out or contract with a consumer to carry out building engineering work (as defined) in the State.

By November 2024, the Western Australian government had completed its review of building regulations and found that substantial changes were required to improve construction standards, boost consumer confidence, and implement national recommendations.⁷¹ New laws are currently being drafted and will be released for public comment before being presented to Parliament.

The energy efficiency changes adopted in the NCC 2022 will be a mandatory requirement in Western Australia from 1 May 2025. However, at this stage the Government will not be adopting the changes regarding the liveable housing requirements, which will be considered in the future under future versions of the NCC.



Northern Territory

The commercial builder registration legislative amendments came into effect on 15 April 2024, requiring registration of commercial builders who work primarily on Class 1b and 3-9 buildings, with exceptions applying in certain circumstances, adopting an approach similar to that of other states.

Although the NCC 2022 requirements broadly commenced in the Northern Territory on 1 May 2023, at this stage the Northern Territory will not increase energy efficiency requirements for residential buildings to the seven-star whole of home requirement. The energy efficiency requirements for residential buildings will remain at the same five-star rating under the NCC 2019.

Tasmania

The Tasmanian Government has deferred proposed updates to the NCC that aim to reduce red tape, lower construction costs, and simplify industry processes. The Government is also advocating for a shift to a five-year amendment cycle for any further changes from NCC 2025 to provide more stability, certainty, and educational opportunities.⁷²

Tasmania's strong project pipeline is driven by population growth and increased demand for housing, schools, hospitals, and infrastructure. To address labour shortages, initiatives like the High-Viz Army initiative and Earthworks Academy have been introduced.⁷³

Additionally, in response to feedback from civil contractors concerned at potential project delays, the Government announced a six-month exemption from new contract arrangements (AS4000-2024) for State rail and road projects.⁷⁴

⁶⁹ Landmark reforms to WA building laws revealed | Western Australian Government

⁷⁰ Building engineering registration

⁷¹ Building and Energy industry reforms

⁷² Slashing red tape to get homes built cheaper, easier, faster | Premier of Tasmania; Tasmania delays NCC updates - Climate Control News; Tasmania to defer adoption of NCC 2025 and 2028

⁷³ Tasmanian Skills Plan

⁷⁴ Working with civil contractors to keep Tasmanian projects flowing | Premier of Tasmania

PART FOUR

NON-COMPLIANT BUILDING PRODUCTS

Introduction

Non-compliant building products continue to be a major concern for the Australian construction industry. Cladding rectification projects are ongoing across the country, accompanied by various claims against entities involved in the construction of affected buildings. Government-funded cladding remediation programs are approaching completion, but many claims have become statute-barred due to the expiration of limitation periods. For the past few years, the focus has been on non-compliant building products in general, with the most significant proposal being the introduction of a risk based Building Product Registration Scheme, outlined earlier.

Class actions updates

Alucobond class action

In 2019, the Owners – Strata Plan No 87231 (**SP 87231**) commenced a class action in the Federal Court against 3A Composites GmbH (**3A**) and Halifax Vogel Group Pty Limited (**Halifax**) in relation to the use of Alucobond PE and Alucobond Plus aluminium composite panels (**ACP**) manufactured by 3A and distributed in Australia by Halifax. SP 87231 seeks damages for the cost of cladding removal and replacement, rectification, increased insurance premiums, building safety assessments and reduced building value. The Federal Court heard the case from August to October 2024, with judgment reserved.

Vitrabond class action

The Owners – Strata Plan No 91086 (**SP 91086**) is the owners corporation for two high-rise residential buildings in Warwick Farm, New South Wales. The façades of these buildings incorporated Vitrabond PE and Vitrabond FR branded ACPs supplied by Fairview Architectural Pty Ltd (**Fairview**). In 2019, SP 91086 commenced a class action against Fairview in relation to buildings fitted with Vitrabond panels supplied between 2009 and 2019. Fairview's voluntary administration in 2020 triggered an automatic stay of the proceedings, but the Federal Court granted SP 91086 leave to proceed against Fairview.

In December 2021 SP 91086 sought to join the insurer pursuant to the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW). Justice Wigney granted the orders in July 2023.⁷⁵ Our case note on the decision is available [here](#). The insurer's appeal was heard in May 2024, with judgment delivered on 4 February 2025. Leave to appeal the joinder order was refused.⁷⁶

⁷⁵ *The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd (No 3)* [2023] FCA 814.

⁷⁶ *AAI Limited v The Owners – Strata Plan No 91086* [2025] FCAFC 6.

Cladding remediation programs – national status update

Bans on the use of ACPs with a core comprised of greater than 30% polyethylene by mass have been applied in New South Wales, Queensland, and Victoria. Although the other states and territories have not enacted outright bans, audits have been performed and the use of ACPs is heavily regulated. Outside Victoria, the limitation periods for actions against those involved in the design and construction of affected buildings have largely expired. The focus in recent years has been on remediation, with the biggest issue being funding the cost.

New South Wales

New South Wales (**NSW**) has the most comprehensive non-compliant building products regime in Australia.

Project Remediate was established by the NSW Government to assist owners of residential apartment buildings with cladding rectification by providing 10-year interest free loans and expert assistance. Registrations are closed, although remediation works continue.

Significant amendments⁷⁷ to the *Building Product (Safety) Act 2017* (NSW) commence in 2025. These introduce a 'chain of responsibility' for a building product, which captures all persons in the supply chain. Key duties imposed on individuals in the chain of responsibility include ensuring non-compliance risks⁷⁸ do not exist, providing information in relation to building products, notifying the Secretary⁷⁹ of non-compliance or safety risks, and product recall. Substantial fines apply for breaches of these duties. There are also various new powers for the Secretary and authorised officers to issue building product warnings and directions and to ban, recall, and investigate non-conforming building products.

Victoria

Cladding Safety Victoria (**CSV**) is in the final stages of implementing its program. Initially focused on addressing the highest-risk structures, CSV is now prioritising lower-risk properties.⁸⁰

A risk-based framework, introduced to guide remediation, emphasises targeted interventions over the complete removal of cladding. This approach utilises existing fire safety measures such as sprinkler systems and focuses on actions like targeted cladding removal, fire system upgrades, and improved egress routes.

In 2021, the Victorian Government extended the limitation period for claims related to combustible cladding to 15 years. The Government is turning its focus to recovering the \$600 million cost of the Cladding Rectification Program from builders and construction professionals.

On 11 December 2024, the Victorian Court of Appeal handed down its decision on a director's appeal against a 2023 County Court decision⁸¹ finding him personally liable for cladding costs. We reported on the 2023 decision in [this case note](#). The director's appeal focused on the legislation's intent, although the court did not accept his technical arguments, finding it "*inescapable*" that the provision applied to retrospective acts or omissions.

While it examined cladding defects on Victorian buildings as part of the Victorian Government's Cladding Rectification Program, CSV identified a very high proportion of the examined properties (nearly 80 percent) had water or moisture related structural damage.⁸² On 13 February 2025, CSV published a research analysis in relation to the non-cladding defects found on Class 2 buildings. CSV examined the performance of external wall systems behind the external layer of cladding and found that while the builder was primarily at fault, the defects were "*symptomatic of broader underlying levels of non-compliance with the National Construction Code, including serious fire safety deficiencies, inadequate waterproofing and the presence of black mould in new buildings (arising because of water ingress).*" CSV identifies this in the research paper as an opportunity for government to develop initiatives including improving architectural design, construction practices, building maintenance, effective oversight by building authorities and to implement reforms to the regulatory system.

⁷⁷ Building Legislation Amendment Act 2023 (NSW) Sch 2.

⁷⁸ A non-compliance risk exists in relation to a building product if the product is or may be a non-conforming building product or an intended use of the product in a building is or may be a non-compliant use (see s 7A(4) Building Legislation Amendment Act 2023 (NSW) Sch 2).

⁷⁹ Secretary of the Department of Customer Service.

⁸⁰ [Cladding Safety Victoria's Strategic Plan 2021-25 | vic.gov.au](#)

⁸¹ *Owners Corporation 1 Plan No Ps 707553k and Ors v Shangri-La Construction Pty Ltd* (ACN 130 534 244) and Anor [2023] VCC 1473

⁸² *Research Analysis No. 2 Non-cladding building defects* | Cladding Safety Victoria, page 02.

Queensland

The Queensland Government continued its cladding rectification and removal process. By 30 November 2024, 96% of government buildings were either undergoing rectification or removal was already complete.⁸³ For private buildings, as of 31 May 2024, more than 18,000 had been cleared with no cladding fire risk, 976 required a solution to address the risk, 308 still needed to complete the combustible cladding checklist process and 345 has notified removal or rectification.⁸⁴ The process is expected to be completed in 2025.

South Australia

South Australia's audit of affected buildings closed some years ago. A Combustible Aluminium Composite Panel Cladding Limited Loan Scheme,⁸⁵ administered by the South Australian Financing Authority, providing owners corporations with access to concessional loans of up to \$15 million with fixed interest rates for up to 10 years, was established in 2023, although in early 2024 no payments had been made.⁸⁶ The Scheme was said to be backed by changes to the Community Titles Regulations 2011 that make it easier to get combustible cladding removed from apartment buildings in South Australia.⁸⁷

This change is evident in the following decision where Burnett J allowed rectification works to go ahead without a unanimous resolution passed by the owners.

In *Community Corporation 22863 Inc v Kursace Air Pty Ltd and Others (Interested Parties)* [2024] SADC 153, the Community Corporation of an apartment building in South Australia sought approval to carry out rectification works. The judgment delivered on 25 November 2024 was required as the resolution passed was not unanimous. It was held that the potentially flammable cladding could be replaced without unanimous owner support despite State law requiring unanimous votes. This demonstrates the willingness of courts to intervene where cladding poses a substantial danger to safety, as the expenditure was deemed necessary and not discretionary.

Western Australia

The Western Australian Government has been less proactive than other jurisdictions in addressing combustible cladding and non-compliant building products. For instance, despite identifying a major fire safety risk in March 2019,⁸⁸ the tender process to remove highly combustible cladding at Fiona Stanley Hospital was only announced in April 2024.⁸⁹ Furthermore, the Government is yet to introduce legislation or regulations addressing non-compliant building products directly.

However, the Government is indirectly addressing non-compliant building products through its proposed 2023 regulatory reforms, which aim to enhance building owner protection, compliance, industry confidence, and regulatory oversight, with the first stage set to begin in 2026. See our initial comments on the reforms [here](#). We see out comments on the development of these reforms in Part three | Building Reform.

The Department of Mines, Industry Regulation and Safety (**DMIRS**) continues to monitor enforcement and remediation progress of high risk buildings identified in its 2020 [State-wide cladding audit report](#).

As of 31 December 2024:

- Of the 52 private buildings referred for enforcement action, remediation works have been completed or compliance demonstrated for 48 of those referrals.⁹⁰
- Of the 50 publicly owned buildings identified as requiring remedial action, remedial action has been completed on 32 buildings.⁹¹



⁸³ Combustible cladding in government buildings | Department of Housing and Public Works

⁸⁴ Managing combustible cladding in Queensland | Department of Housing and Public Works

⁸⁵ [acp-cladding-loan-scheme-guidelines-final.pdf](#)

⁸⁶ Hansard Daily: House of Assembly - Thursday, February 8 2024

⁸⁷ *Community Titles Regulations 2011 (SA)* r 21 (inserted in February 2023).

⁸⁸ Cladding audit leads to remediation works at Fiona Stanley Hospital

⁸⁹ Tender #1443431

⁹⁰ State-wide Cladding Audit Status update for private buildings as at 31/12/2024

⁹¹ State-wide Cladding Audit Status update for publicly owned buildings as at 31/12/2024

⁹² Residential Building (Miscellaneous Consumer Protection Amendments) Act 2023 (Tas).

Tasmania

Tasmania made no changes to its non-compliant building products regime in 2024. October 2023 amendments⁹² to the *Building Act 2016* (Tas) (**Building Act**) brought in new defective work provisions. For works that do not comply with the NCC or Building Act, the amendments provide for a new Defective Work Order that can be issued on the builder or the registered building owner up to 24 months after a certificate of completion has been issued. The person served with the order must ensure defective works are rectified.

Australian Capital Territory

The Territory made a few notable developments in relation to non-compliant building products in 2024.

In relation to cladding, applications for the Private Buildings Concessional Loan Scheme remain open until 27 February 2026. This gives eligible owners corporations a concessional loan up to \$15 million to pay for combustible cladding remediation works.

To support eligible owners corporations to assess the risk of cladding on their buildings, the ACT Private Buildings Cladding Testing and Assessment Scheme offered grants up to \$20,000. Applications closed on 21 July 2022. However, on 20 May 2024 the Private Buildings Cladding (Supplementary) Scheme opened for eligible owners corporations that did not receive a rebate under the previous Scheme to receive funding. Applications are set to close on 20 March 2025.⁹³ The current financial support Scheme does not extend to individual owners.

Rectification Regime: Residential Defects

Effective from 11 July 2024, the *Property Developers Act 2024* (ACT) introduces a rectification regime for residential building work with development approval. Under this regime, the definition of property developers includes landowners, principal builders, and others prescribed by regulation. The registrar can issue rectification orders for serious defects, defined as non-compliance with building standards or defects causing significant safety risks. Notably, directors of corporate property developers under winding-up orders can be held personally liable for rectification. Penalties apply for failure to comply with a rectification order.

Northern Territory

The Northern Territory is probably the least proactive jurisdiction when compared the rest of Australia with respect to the issue of non-compliant building products. It remains the only jurisdiction that has not completed, nor is it in the process of completing an audit into the use of ACPs and combustible cladding more generally. The Territory Government has not introduced a ban on combustible cladding and only requires compliance with the NCC. However, the Government has been providing building notes⁹⁴ pertaining to non-conforming building products and combustible cladding, in line with the NCC.



⁹² *Residential Building (Miscellaneous Consumer Protection Amendments) Act 2023* (Tas).

⁹³ Funding for testing and assessing cladding - Infrastructure Canberra

⁹⁴ Building notes | NT.GOV.AU

PART FIVE

PROPORTIONATE LIABILITY – STATE OF PLAY

Ever since its introduction as part of the tort reform of the early 2000s, proportionate liability has been a staple in the toolkit for those defending negligence claims. It has proven to be a particularly valuable tool in defence of professionals in a range of industries, including construction. In two recent judgments, the High Court has altered the availability of the defence in important respects particularly for claims arising from construction projects.

Proportionate liability – a primer

The proportionate liability legislation, enacted in each state and territory, empowers courts to allocate responsibility for loss or damage arising from “apportionable claims”⁹⁵ between “concurrent wrongdoers”.⁹⁶ Similar provisions in Federal legislation allow apportionment of liability between defendants to claims alleging misleading or deceptive conduct.⁹⁷

Under the prior common law regime of joint and several liability, a plaintiff could choose their recovery target of choice. In construction disputes, this was often a professional known to hold insurance. The professional, or their insurers, were then forced to take action against others who may be responsible for the loss. Proportionate liability legislation radically changed this position and largely moved the risk and burden of recovery to the plaintiff. The shift in risk is most significant where one concurrent wrongdoer is insolvent or cannot be found—especially where that party has contributed significantly to the loss.⁹⁸

Differences between state and territory regimes

While the national regime is largely consistent, it is not uniform. The most important differences relate to the ability to contract out and whether concurrent wrongdoers have to be joined to proceedings.

Contracting out

Parties involved in construction projects commonly wish to allocate liability in a manner that provides a degree of certainty, as well as ease of recovery for the principal or head contractor. Proportionate liability, where it applies, may complicate recovery by a principal. How a court may allocate risk in any particular case is highly dependent on the facts, making it difficult to predict at the time of contracting. The law of the contract will determine whether parties can exclude the operation of proportionate liability.

The law in **New South Wales, Tasmania and Western Australia** expressly permits parties to a contract to contract out of the proportionate liability regime.⁹⁹ For example, one party may agree to indemnify the other in full where it breaches the contract, to the exclusion of the proportionate liability regime.

By contrast, **Queensland** law expressly prohibits parties from contracting out of its proportionate liability regime.¹⁰⁰



⁹⁵ Apportionable claims are claims involving a failure to take reasonable care.

⁹⁶ *Civil Liability Act 2002* (NSW), Part 4; *Civil Liability Act 2003* (Qld), Pt 2; *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA), Pt 3; *Civil Liability Act 2002* (Tas), Pt 9A; *Wrongs Act 1958* (Vic), Pt IVAA; *Civil Liability Act 2002* (WA), Pt 1F; *Civil Law (Wrongs) Act 2002* (ACT), Ch 7A; *Proportionate Liability Act 2005* (NT).

⁹⁷ *Competition and Consumer Act 2010* (Cth), s 87CD; *Corporations Act 2001* (Cth), s 1041N; *Australian Securities and Investments Commission Act 2001* (Cth), s 12GR.

⁹⁸ For example, in the important case of *Hunt & Hunt Lawyers v Mitchell Morgan Nominees Pty Ltd* (2013) 247 CLR 613, the High Court held a firm of solicitors who had negligently prepared a mortgage were only 12.5% responsible for the plaintiff's loss, while two other parties who had defrauded the plaintiff and caused the same loss were responsible for the balance of 87.5%.

⁹⁹ *Civil Liability Act 2002* (NSW), s 3A(2); *Civil Liability Act 2002* (Tas), s 3A(3); *Civil Liability Act 2002* (WA), s 4A.

¹⁰⁰ *Civil Liability Act 2003* (Qld), s 7(3).

Other state and territory laws are silent as to whether parties may contract out. Whether contracting out in these jurisdictions is possible remains uncertain.

Victorian position – joining concurrent wrongdoers

In most Australian jurisdictions, concurrent wrongdoers do not have to be joined to proceedings. The defendant only needs to notify the plaintiff of the concurrent wrongdoer and plead the conduct relied on.

However, the Victorian legislation requires defendants who wish to rely on proportionate liability to ensure that each other concurrent wrongdoer is joined to the legal proceedings.¹⁰¹ The only exception is where the concurrent wrongdoer is dead or, if a corporation, has been wound up. This places the burden of locating and joining concurrent wrongdoers on the defendants.

Victorian position – importance of pleadings

Another emerging difference concerns the approach taken by courts in Victoria to determining whether a non-tortious claim falls within the scope of the proportionate liability legislation. In short, particular emphasis has been placed on the manner in which a claim is pleaded.

In a decision arising from the Lacrosse Apartment fire,¹⁰² the Victorian Civil and Administrative Tribunal (VCAT) held that claims made against a builder for breach of warranties implied by statute (such as fitness for purpose) did not depend on a finding that the builder had failed to exercise reasonable care. In an application for leave to appeal from this decision, the Victorian Court of Appeal was asked to reconsider whether the breach of warranty claims against the builder were apportionable, in light of the builder's defence as a whole. Rejecting the submission that the warranty claims were apportionable, the Court held that the *"the terms in which a claim is framed against a concurrent wrongdoer are an essential determinant of whether the claim can be said to arise from a failure to take reasonable care"*.¹⁰³

Judges in other states have favoured a broader approach – notably New South Wales. In *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq)* (No 2), Stern JA observed that *"there remains considerable support at the appellate level for an approach to s 34(1)(a) that looks to both how a claim is framed, and to the findings of the court, but is not limited in its focus to the narrow question whether a lack of reasonable care is an element of the cause of action"*.¹⁰⁴

A recent decision in the Victorian County Court, *Owners Corporation 1 PS721535N v Team Building (Vic) Pty Ltd & Ors*, indicates the ongoing tension in the authorities. Judge Curtain said: *"[i]n my view, there is enough uncertainty in the authorities, and lack of a binding ratio decidendi, that the question of whether only the pleadings may define if a claim is apportionable, or whether that is a question to be determined after hearing all the evidence, is open and arguable"*.¹⁰⁵



¹⁰¹ Wrongs Act 1958 (Vic), s 24AI(3).

¹⁰² *Owners Corporation No. 1 of PS613436T v LU Simon Builders Pty Ltd* [2019] VCAT 286; see [282] to [286], [579].

¹⁰³ *Tanah Merah Vic Pty Ltd v Owners Corp No 1 of PS613436* [2021] VSCA 72 at [117] and [120].

¹⁰⁴ Eg, *Gerrard Toltz Pty Ltd v City Garden Australia Pty Ltd (in liq)* (No 2) [2024] NSWCA 232 at [182]; see also Basten AJA at [234] to [240].

¹⁰⁵ [2024] VCC 1633 at [72].

The resolution of that tension may need to await an appropriate case reaching the High Court.

Recent High Court cases

The High Court has recently handed down two significant cases impacting the availability of proportionate liability in construction cases:

1. In *Pafburn Pty Ltd v The Owners – Strata Plan 84674* [2024] HCA 49 (11 December 2024), the High Court held that a proportionate liability defence was not available to a claim made against a builder and developer under the *Design and Building Practitioners Act 2020* (NSW).
2. In *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* [2024] HCA 24, the High Court ruled on what had become a contentious question in the Australian arbitration landscape. The issue was whether respondents to arbitration (compared with court proceedings) could rely on proportionate liability as a defence to reduce the quantum of a claim.

In cases ending with a decision of the South Australian Supreme Court in *Tesseract*, courts had held that the proportionate liability regime only applied in court proceedings and not in arbitration.

The High Court has now held that proportionate liability can be raised as a defence in arbitration proceedings – providing, importantly, that the parties have not agreed to exclude the proportionate liability regime in their contract.

Takeaways

The decision in *Tesseract* permitting parties to rely on proportionate liability in arbitration was made on the basis of the South Australian legislation. It is likely to be held applicable to at least most other state and territory regimes.

Given arbitration clauses feature commonly in construction contracts, close attention should be paid to clauses impacting the application of the proportionate liability regime.

PART SIX

DISCLOSURE MATTERS

An insured's duty of disclosure under s 21 of the *Insurance Contracts Act 1984* (Cth) (**ICA**) is a fundamental aspect of Australian insurance law. During 2024 the courts considered a number of cases involving issues of alleged non-disclosure by insureds and the remedies available to insurers under s 28 of the ICA in relation to innocent and fraudulent non-disclosure¹⁰⁶.

Each of these cases considered factually specific issues and involved different policies of insurance, which could be discussed in detail in individual case notes. However, these recent cases serve as a reminder of:

- The importance of the questions asked by insurers in their proposal forms, particularly in relation to the nature of business to be insured and what activities are undertaken by the proposed insured. This is particularly relevant in relation to design and construct professional indemnity insurance and the work undertaken by a prospective insured.¹⁰⁷
- The risks for insurers in accepting another insurer's proposal form and the potential for an insurer to waive an insured's duty of disclosure by failing to seek particulars or details of the risk where an insured has provided a fair presentation of that risk.¹⁰⁸
- The importance of full disclosure when applying for a contract of insurance, given the remedies available to insurers under s 28 of the ICA to reduce, or in some cases avoid, liability under the contract of insurance where there has been a failure to disclose material information.

Separately, in a decision that may have wider implications in relation to a range of insurance issues, one of the issues the New South Wales Court of Appeal considered in *Cimic Group* was the relationship between an insured's duty of disclosure and a continuity clause and, whether as a matter of construction of the relevant policy, insurers had waived the insured's duty of disclosure under section 21 of the ICA.

The Court of Appeal did not accept that the duty was waived and held that “[c]lear words would be expected for such a conclusion”¹⁰⁹ in circumstances where the policies were entered into on the basis of a proposal that asked whether the insured was aware of any circumstances that might give rise to a claim against it and its directors or officers.

¹⁰⁶ *Absolute Tiling Solutions Pty Ltd v Certain Underwriters at Lloyds* [2024] NSWSC 364; *Carter v Chubb Insurance Australia Ltd* [2024] FCA 1312; *Zurich Australian Insurance Ltd v Cimic Group Ltd & Ors* [2024] NSWCA 229; *J&J Richards Super Pty Ltd ATF The J&J Richards Superannuation Fund v Nielsen* [2024] FCA 1472

¹⁰⁷ See *Absolute Tiling* from [172] and the findings at [219] and [220]

¹⁰⁸ See *The J&J Richards Superannuation Fund* at [325] – [351]

¹⁰⁹ *Zurich Australian Insurance v Cimic* at [361]

Key contacts

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

Queensland

Kiley Hodges

Partner, National Property & Construction Lead

+61 7 3016 5007 | Kiley.Hodges@sparke.com.au

South Australia & Northern Territory

Arelene Lowry

Partner

+61 8 8960 0702 | Arelene.Lowry@sparke.com.au

New South Wales & ACT

Dino Liistro

Partner

+61 2 9373 3541 | Dino.Liistro@sparke.com.au

Western Australia

Chris Rimmer

Partner

+61 8 9492 2288 | Chris.Rimmer@sparke.com.au

Jon Tyne

Partner

+61 2 9260 2683 | Jonathan.Tyne@sparke.com.au

Sarah Richards

Special Counsel

+61 8 9288 8057 | Sarah.Richards@sparke.com.au

Victoria Huntington

Special Counsel

+61 2 9260 2496 | Victoria.Huntington@sparke.com.au

Victoria & Tasmania

Patrick McGrath

Partner

+61 3 9291 2369 | Patrick.McGrath@sparke.com.au

Jehan Mata

Partner

+61 3 9291 2374 | Jehan.Mata@sparke.com.au

Authors

Thank you to the other contributors to this issue of the the Construction Update for the Insurance industry.

Brisbane

Brooke May

Associate

+61 7 3016 5038 | Brooke.May@sparke.com.au

Sydney

Alexandra Wills

Lawyer

+61 2 9260 2539 | Alexandra.Wills@sparke.com.au

Grace Garraway

Paralegal

+61 7 3016 5037 | Grace.Garraway@sparke.com.au

Mia Wilcox

Lawyer

+61 2 9260 2747 | Mia.Wilcox@sparke.com.au

Melbourne

Cindy Nguyen

Paralegal

+61 3 9291 2269 | Cindy.Nguyen@sparke.com.au

Demi Tsirigotis

Lawyer

+61 3 9291 2236 | Demi.Tsirigotis@sparke.com.au



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