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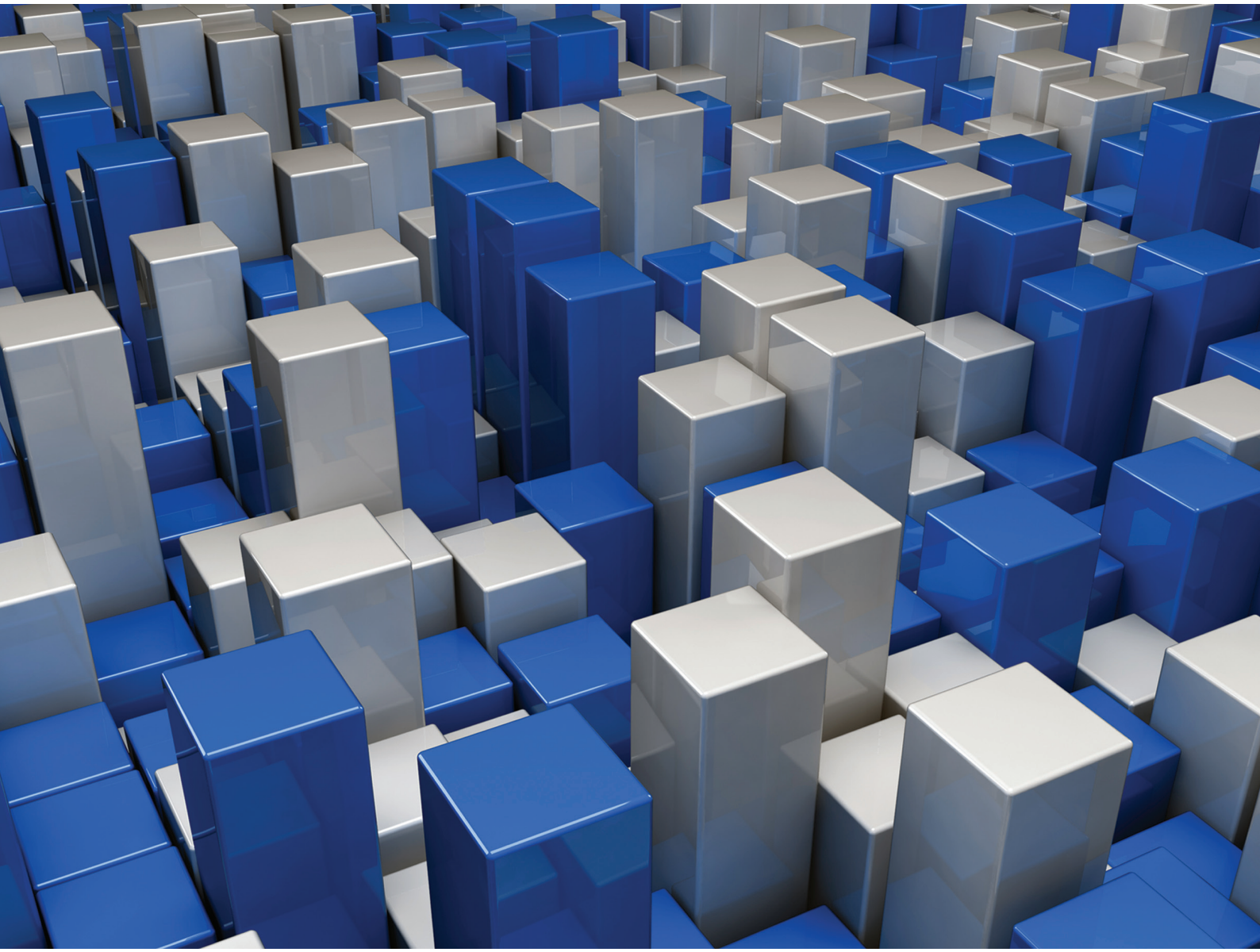

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CONTENTS #177
ARTICLES

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EDITORIAL

Myra Nikolich

Elizabeth Pearson considers whether, one year on from their enactment, the *Building and Construction Industry (Improving Productivity) Act* 2016 (Cth) and the *Code for the Tendering and Performance of Building Work 2016* (Cth) are in effect Australia's first Commonwealth security of payment laws. In a detailed discussion, the author examines the history and content of the federal security of payment provisions contained in the Act and the Code, assesses the practical and symbolic impact of these provisions and investigates whether they are within the Commonwealth's legislative power. The author concludes that although further Commonwealth legislation is necessary in order to effect substantive change in the industry, the Act and the Code pave the way for the possibility of more, wide–ranging reforms in future.

Victor Lau reports on the recent passing of the Apology Bill by the Hong Kong's Legislative Council, the first Asian jurisdiction to have enacted this type of legislation. In the author's view, the Bill provides a timely reminder of the oft–forgotten value of an apology as a means of settling disputes. The Bill provides that an apology does not constitute an admission of fault or liability and is not admissible in evidence. However, lawyers involved in international construction dispute resolution should be aware of the significant jurisdictional differences which may affect whether an apology is protected.

Damien Butler and Catherine Bell write about the recent amendments to the *Corporations Act 2001* (Cth) which have introduced a prohibition on the enforcement of ipso facto clauses in certain circumstances.

Mark Geritz and Tosin Aro, in a short note, tell us that the decision in *Sandy on behalf of the Yugara People v State of Queensland* [2017] FCAFC 108, by the Full Federal Court, has confirmed that native title no longer exists anywhere in Brisbane. While the decision will be welcomed in some quarters, it may prove to be the cause of uncertainty in other areas—particularly in relation to Aboriginal cultural heritage.

Lauren Gray, in a well–researched paper, examines the validity of 'limitation of liability' clauses in the context of a construction project, and analyses a number of trial judge cases which have upheld a party's ability to limit their liability. The author discusses the impact of misleading and deceptive conduct claims on the construction industry, drawing on case examples in relation to delay, scope, latent conditions, construction costs and payment disputes. She argues that the impact of misleading and deceptive conduct claims on the construction industry is so significant that the validity of limitation of liability clauses ought to be properly examined by appellate courts or the legislature.

Abigail McGregor, Jehan–Philippe (JP) Wood and Greg Vickery describe how the federal government proposes to introduce legislation to require large businesses to report annually on their actions to address modern slavery in their operations and supply chains. Construction, real estate and development industries are about to come under renewed scrutiny in relation to their supply chain due diligence and labour practices. The authors provide a number of steps that these businesses should consider taking. By doing so, they will be well placed to respond effectively to the new regulations and show that

they are committed to eradicating modern slavery, in Australia and overseas, and taking concrete steps to achieve that objective.

Dr Allison Stanfield reports on Technology Assisted Review (TAR) in Australia and the United States. The author explains that TAR is a number of different 'clever' technologies, including 'clustering', 'concept searching', 'email threading', 'near de–duplication' and 'predictive coding'. In–built features, such as predictive coding, are being celebrated as the answer to help curtail ever–increasing litigation costs, and research is ongoing in order to find even more clever ways of finding what lawyers seek in a repository of documents. It's the way of the future and a very interesting read.

Timothy Seton and Isabella Johnston report on a recent case in which the court considered the extent to which an adjudicator appointed under the *Building and Construction Security of Payment Act 2009* may receive assistance in deciding an adjudication application. In *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* [2017] ACTSC 177, the court found that the role of adjudicator is personal to the person who accepts their appointment and that a determination will be void if the adjudicator impermissibly delegates their function. The authors helpfully provide a number of key things to consider from this decision

Thomas Snider and Camelia Aknouche discuss confidentiality in international arbitration. It remains a key benefit of arbitration, and it is often cited as one of the most significant reasons parties choose to arbitrate instead of litigate. However, the scope of confidentiality can vary from one jurisdiction to another and from one stage of the arbitral process to another. The authors provide an overview of confidentiality in international arbitration and highlight some circumstances in which aspects of the arbitral proceedings or the award itself may become exposed.

Jane Hider and Sophia Georgeff discuss errors in technical standards in an infrastructure contract. They report on a recent United Kingdom decision which focused on whether a provision relating to fitness for purpose was breached and highlighted the risks to both parties involved in this approach to contracting.

Nick Rudge and Caroline Swartz–Zern report on a recent decision which suggests that Australian courts will narrowly interpret the scope of their jurisdiction to support foreign arbitration in obtaining evidence on the basis that the *International Arbitration Act's* scope only extends to international arbitrations seated domestically. It remains to be seen whether *Re Samsung C&T Corporation* [2017] FCA 1169 will be appealed.

Dr Donald Charrett provides a detailed review of *Quantification of Delay and Disruption in Construction and Engineering Projects* by Robert J Gemmell. I am sure that you will find the review informative and I encourage you to read the book.

We end this newsletter and the year on a sad note, with a tribute to our Editor who passed away in October.

Finally, I take this opportunity to thank you, our loyal readers, for your interest in and support of the ACLN, and to wish you and your loved ones a happy and safe festive season and a prosperous 2018.

POLITICAL FLIM–FLAM OR GROUND–BREAKING REFORM? A COMMENT ON THE *CODE FOR THE TENDERING AND PERFORMANCE OF BUILDING WORK 2016* (CTH)

Elizabeth Pearson, Associate

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John Murray AM's much–anticipated report on Australia's security of payments laws is due to be delivered to the Turnbull Government by 31 December 2017. On the first anniversary of the enactment of the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) and the *Code for the Tendering and Performance of Building Work 2016* (Cth) in December 2016, this paper considers whether this legislation is in effect Australia's first Commonwealth security of payments law.

INTRODUCTION

The *Building and Construction Industry (Improving Productivity) Act 2016* (Cth) has already proven to be one of the most controversial pieces of legislation in recent parliamentary history.[1] Twice rejected by the Senate during the 44th Parliament,[2] the Bill to restore the Australian Building and Construction Commission (ABCC) served as a trigger for Prime Minister Turnbull to call the nation's seventh double dissolution election.[3] The Bill subsequently became only the fourth trigger Bill ever to successfully pass both Houses after reintroduction,[4] though not without significant cross–bench amendment. The finished product has been called many things: a 'vindication for the Turnbull government';[5] a 'significant win' for industry;[6] and a restoration of the rule of law.[7]

Yet one of the Act's most salient features has been largely overlooked. The rhetoric of resurrecting a 'Howard–era watchdog'[8] and 'union busting'[9] that dominated parliamentary debate and reportage masked a watershed moment in Australian construction law. The Act has ushered in surprising law reform in the guise of a building code of practice issued as a legislative instrument under section 34.

Twelve months after enactment, much has been said and written about the statute, but little attention has been paid to the fact that the Act and its subordinate legislation[10] are effectively the first Commonwealth laws with respect to security of payments.

Federal security of payments reform has been long awaited and much anticipated, which makes it all the more dangerous to attempt in the throes of hyper–politicised debate and midnight Senate sittings. Yet late hour amendments to the Act moved by the Nick Xenophon Team led to the creation of the Security of Payments Working Group to monitor and advise on the ABCC's impact on payment practice.[11] Furthermore, the *Code for the Tendering and Performance of Building Work 2016* (the Code) created by the Minister for Employment under section 34 of the Act introduced the requirements that contractors tendering for or undertaking Commonwealth funded building work must ensure all payments due and payable are made in a timely manner and not unreasonably withheld, and report breaches of state and territory security of payments laws to the ABCC. Collectively the Act and its subordinate legislation is, for all intents and purposes, the first pass at federal security of payments legislation.

When Australia's first security of payments legislation was introduced in New South Wales in 1999, it was touted as an important blow in the long fight to end the 'unAustralian practice' of not paying construction contractors for their work.[12] Almost twenty years later, that battle is yet to be won. Poor payment practice remains endemic in the nation's building and construction industry despite the implementation of security of payments laws in all states and territories.[13]

The sector employs one in ten Australians,[14] contributing about eight percent of the gross domestic product.[15] Disproportionately, the industry accounts for up to 25 per cent of all insolvencies in Australia.[16] The country's 'fragmented and disparate' security of payments legislative regime was a constructive move that has failed to live up its potential.[17] A national industry cannot be successfully governed by eight divergent state and territory security of payments regimes. Three reports in 13 years have called for Commonwealth legislation to harmonise these schemes.[18] Yet successive federal governments have been slow to move on this issue.

The Act did not attempt to address the issue of harmonisation across jurisdictions. Indeed, it would have been reckless and irresponsible to do so without the benefit of industry consultation. Nevertheless, the creation of Commonwealth legislative provisions concerning security of payment is a remarkable development in construction law for two reasons. First, it flies in the face of conventional wisdom which maintained for more than a decade that security of payment did not fit neatly under a Commonwealth legislative head of power and was therefore best left to the states and territories to regulate. Second, it demonstrates an unprecedented willingness on the part of the Commonwealth Government to actively shape policy in this space.

This paper considers whether the Act and the Code can make any meaningful difference to payment practice in the construction industry. [It also] examines the history and content of the federal security of payment provisions contained in the Act and the Code, assesses the practical and symbolic impact of these provisions [and] investigates whether these provisions are within the Commonwealth's legislative power. Ultimately, this paper concludes that further Commonwealth legislation is necessary in order to effect substantive change in the industry. Nevertheless, this Act should be recognised for its symbolic importance as Australia's first unilateral Commonwealth security of payment law. By overcoming key doubts over the capacity and appetite of the Australian Parliament to legislate for security of payment, this legislation has served in effect as a dry run, clearing the way for further, much–needed reform.

LEGISLATIVE BACKGROUND

THE ACT

There is no doubt that the Turnbull Government did not originally intend for this Act to serve as a vehicle for security of payment reform. The object of the Bill, as described in the Prime Minister's second reading speech, was to:

... provide an improved workplace relations framework to ensure building and construction work is carried out fairly, efficiently and productively for the benefit of all building industry participants and for the benefit of the Australian economy as a whole.[19]

There was no mention of security of payment in the government Bill negatived by the Senate on 17 August 2015 and 18 April 2016.[20] Security of payment provisions were not formally proposed in any of the cross–bench amendments at that time.[21] Nor was there any mention of security of payment in the Bill reintroduced after the election in August 2016,[22] or in the Prime Minister's second reading speech.[23]

This omission drew criticism in the Senate on multiple fronts. The Opposition accused the Government of ignoring:

... one of the biggest problems in the building and construction industry—that is, the non–payment of contractors, subcontractors and employees for work that they carry out.[24]

That sentiment was echoed by minority party leader Senator Nick Xenophon, who argued that:[25]

If we are to be serious about the issue of productivity and bad behaviour in the construction sector, the issue of security of payments is fundamental to that. We cannot simply talk about the behaviour of some in the union. We also need to talk about the behaviour of a number of principal contractors and the way that people have been left in the lurch, the way that many thousands of subcontractors have not been paid and have not been treated fairly and that many have been driven to either the brink of bankruptcy or actual bankruptcy.

To that end, the Nick Xenophon Team proposed amendments to the Bill in November 2016, advocating for a new provision to establish a Security of Payments Working Group to monitor and advise on the ABCC's impact upon industry compliance with security of payments laws.[26] These amendments were accepted by the Government and form Part 4 of the Act.

The Security of Payments Working Group is made up of 11 Ministerial appointees intended to represent a range of industry interests and stakeholders, including the ACTU, Master Builders Australia, the Housing Industry Association and the Subcontractors Alliance.[27] The Working Group has met twice since its formation in 2017[28] but little information is available as to its agenda or activities to date. Interestingly, section 32A of the Act refers specifically to the Working Group's role in monitoring compliance with laws:

... of the Commonwealth, the states and the territories that relate to the security of payments that are due to persons in relation to building work.[29]

Without wishing to pre–empt the outcome of the national review of security of payments law by John Murray AM, this specific statutory reference to Commonwealth security of payments laws suggests that further federal legislation is on the horizon.

THE CODE

Section 34 of the Act empowers the Minister for Employment to issue a building code of practice to be complied with by persons in respect of building work. The Code was intended to 'govern industrial relations arrangements for government–funded projects'[30] and 'ensure that the enterprise bargaining agreements and the conditions on government funded building sites are fair and that taxpayers' dollars are used efficiently'.[31] In December 2016, the Minister issued a new *Code for the Tendering and Performance of Building Work 2016* which superseded the previous Building Code 2013 made under section 27 of the *Fair Work (Building Industry) Act 2012* (Cth).

The Code applies to building contractors,[32] building industry participants,[33] and their related entities from the first time that they submit a tender or expression of interest for Commonwealth funded building work[34] after 2 December 2016.[35] These actors are termed 'code covered entities' by section 6 of the Code. Once subject to the Code, these entities are required to adhere to its requirements henceforth, even when undertaking new privately funded projects.[36] The Code is administered by the ABCC.

The breadth of security of payment obligations imposed by the Code, seemingly without warning, is curious. The Department of Employment undertook industry consultation in relation to the Code as early as December 2013.[37] A draft of the code was circulated for comment in April 2014[38] and a further advance was released in November that year.[39] At this time, the draft *Building and Construction Industry (Fair and Lawful Building Sites) Cod*e did require code covered entities to 'comply with all laws and other requirements that apply to the entity in relation to the security of payments that are due to persons in respect of building work'.[40] According to the Explanatory Memorandum, the intention behind this subsection was to 'ensure that all parties in the contract chain receive payments owed to them in a timely manner'.[41] However, that was the extent of reference to security of payment.

When the Code was finally issued on 2 December 2016, it went considerably further, imposing extensive security of payment obligations on contractors. In addition to the original requirement to comply with all applicable security of payments laws,[42] the Code contained a new requirement for contractors to 'ensure that payments which are due and payable by the code covered entity are made in a timely manner and are not unreasonably withheld'.[43]

Furthermore, the Code required code covered entities to have and comply with a 'documented dispute settlement process that details how disputes about payments to subcontractors will be resolved',[44] to ensure as far as practicable that 'disputes about payments are resolved in a reasonable, timely and cooperative way',[45] and to 'report any disputed or delayed progress payment to the ABC Commissioner and the relevant funding entity as soon as practicable after the date on which the payment falls due'.[46]

The terms 'disputed' and 'delayed' were not defined in the legislation. The ABCC has explained that for the purposes of sections 11D and 11E of the Code, a progress payment is ''disputed' when it is referred to adjudication'.[47] Moreover, a payment is delayed when 'the amount payable in accordance with a determination of an adjudicator is not paid by the date that the payment fell due, as dictated by the determination'.[48]

Additionally, the Code prohibits code covered entities from seeking to avoid payments due by engaging in fraudulent or illegal phoenixing,[49] or threatening or coercing a contractor in relation to security of payments matters.[50] The intention behind these Code requirements is to facilitate strict compliance with existing security of payments laws via the introduction of Commonwealth oversight and penalties. Failure to comply with the Code may lead to the code covered entity being sanctioned by the ABCC and prevented from tendering for and undertaking Commonwealth funded building work.[51]

In essence, the Code established the bare bones of a Commonwealth security of payment regime while the Act creates a new level of Commonwealth oversight over what has previously been the domain of the states and territories. Although it leans heavily on the detailed requirements of existing state and territory security of payment laws, the Code institutes new requirements, prohibitions, enforcement mechanisms and punishments which exist separately to those contained in state and territory security of payment regimes. The issue is whether this additional regulation and Commonwealth intervention will be enough to address the longstanding issues that have plagued the industry.

IMPACT OF THE CODE

The nature of the security of payment provisions created by the Code is not in and of itself controversial. These principles have been enshrined in state and territory laws for many years and it is universally accepted that contractors deserve to be paid for their work. Rather, it is the setting of these provisions—in Commonwealth industrial relations legislation—that is remarkable, given the inertia of federal security of payment policy over the last decade. This legislation is an important development because this is the first time that the Commonwealth has actively legislated in this field and attempted to muscle in on security of payment policy.

This begs two questions: first, why has the Commonwealth finally acted now; and will this reform make any practical difference to payment practice in the building and construction industry? This chapter evaluates the practical and symbolic impact of the security of payment provisions.

IMMEDIATE PRACTICAL IMPACT

It has been suggested that this legislation will offer a greater deterrent to payment malpractice because it increases scrutiny and introduces new penalties for non–compliance with existing state and territory security of payment laws. Then ABCC National Manager of the Building Code, Cathy Cato, told a Senate Estimates hearing in March 2017 that via the reporting requirements 'we are able to add a great deal of oversight in the space'.[52] Similarly, Senator Xenophon suggested during debate of the Bill that the amendments were 'a very useful and significant step forward to make an actual difference to security of payments laws'.[53] He stated that:[54]

A requirement to comply with security of payments legislation is not a new feature of the Building Code; however, the ABCC—or the FWBC in the past—has not undertaken any serious compliance work to ensure contractors are complying with their obligations. As I mentioned previously, this amendment works in tandem with the new section 11D of the Building Code. It creates a new clause that strengthens the requirement for code–covered entities to comply with security of payments legislation. While the amendment could be criticised in that it repeats what is already contained in various state and territory security of payments legislation, the laws that the ABCC will be tasked with undertaking include compliance activities to ensure contractors are complying with their security of payment obligations. If, for example, during a building code audit an ABCC investigator is told by a subcontractor that they are having difficulty obtaining a progress payment from a contractor, formal compliance activity can be undertaken, together with other amendments that I am moving to ensure impartiality—to ensure that the work of the ABCC must be carried out in an impartial and effective manner which lends itself to administrative law remedies— that will give it more teeth. This addition to the building code, together with the establishment of a security of payments working group, is designed to effect cultural and attitudinal change in the industry.

In expressing the Government's support for the Xenophon amendments, the Minister for Employment, Senator the Hon Michaelia Cash, described this as a 'sensible proposal that will assist the ABCC to bring about meaningful reforms and improve the compliance of building industry participants with security of payments laws'.[55] By contrast, Labor Senator the Hon Doug Cameron dismissed the amendments as a 'piece of flim–flam' and 'another backroom deal that will not actually fix the problem'.[56] Similarly, Dave Noonan of the CFMEU described the provisions as 'pretty weak', warning that:[57]

The powers that be in the construction industry... will do everything they can to ensure that this doesn't bear fruit and that the large contractors are able to continue to use progress payments and retention payments which actually belong to subcontractors as working capital for their own businesses.

Twelve months after the Code was issued, there has been little evidence of immediate change or improvement in payment practice. Then ABC Commissioner, Nigel Hadgkiss ACM, announced in May at the 2017 Budget Senate Estimates that a show cause notice had been issued to a contractor for an alleged breach of the Code relating to security of payment.[58] Certainly, increased Commonwealth scrutiny, backed up with heftier penalties, has the potential to exert a greater deterrent effect. This is contingent though on execution and enforcement, the tenacity and success of which can only be seen and judged in time.

Conversely, there is a real risk that this legislation could exacerbate existing confusion as to parties' rights and obligations under security of payments laws. At present, the Commonwealth has not signalled its intention to cover the field and usurp state and territory legislation. Rather, the Code relies heavily upon the detail of these existing regimes. The legislation fails to address any of the issues of inconsistency between state and territory regimes which have undermined

the effectiveness of reform to date.[59] Although Commonwealth intervention is a positive step, it would be more effective if followed through with further legislation to comprehensively harmonise existing regimes, for example by creating consistent definitions of business days, consistent time periods, exclusions and statutory carve outs, and complex claim provisions.

This legislation is a promising step but without further reform at a Commonwealth level, the Act and the Code are not enough to effect meaningful cultural change.

SYMBOLIC IMPORTANCE

Although the practical effects of the legislation may be slight, and in any event will take some time to manifest, the immediate symbolic effect of the legislation should not be underestimated. The legislation represents unprecedented Commonwealth involvement in security of payments regulation. The question is why now? There are two answers. The first is purely pragmatic. The Prime Minister's reputation and the credibility of his Government rested on successfully passing the Act and restoring the ABCC. After the 2016 election, the Senate featured the largest number of cross–bench senators in its history.[60] This meant that the Government was forced to negotiate with 21 cross–bench senators to gain the requisite numbers to successfully pass the legislation. The timing was therefore a creature of political necessity.

Cynics may suggest this legislation was merely an exercise in political expediency, and to construe it as anything more would be to overreach. However, governments are generally not in the business of simply agreeing to whatever amendments are put in front of them for the sake of buying cross–bench votes.

If that was indeed the case, there would never have been a double dissolution election to begin with. Minister Cash told reporters in April 2016 that although the Government was prepared to 'negotiate in good faith' with the cross–bench, 'we will not accept amendments that do not either enhance the ABCC legislation or alternatively, we will not accept amendments that detract in any way from this important body'.[61]

Other amendments were proposed to the Government. Some were agreed to, others were declined. The reason the Government was comfortable to agree to the Xenophon amendments and move ahead with security of payments provisions must be because the Coalition had reached an internal policy position where it was prepared to not only countenance federal intervention in security of payment, but actually act on it. This suggests that the old fears which previously waylaid Commonwealth interference had been put to bed.

This hypothesis is strengthened by the Government's announcement in December 2016 of an inquiry into national security of payments law and best practice by John Murray AM. Curiously, the Liberal Member for Fisher, Andrew Wallace MP, delivered his maiden speech to the House of Representatives on the same day that the Act was reintroduced in the lower house. Although the Act did not contain any reference to security of payment at that time, the Member stated that:[62]

I am also passionate about the protection of subcontractors' security of payment. With eight separate forms of security–of–payment regime in this country, it is time that we moved toward the harmonisation of our laws which seek to protect the subcontractors in Fisher and throughout the nation.

This change in attitude is significant because it suggests the Federal Parliament may be amenable to embracing further changes in this space after more than a decade of procrastination.

More recently, the Federal Opposition moved a motion in the Senate in August 2017 to disallow the Code in its entirety.[63] The motion proved unsuccessful, voted down by a majority of five.[64] Although debate focused largely on the Code's industrial relations provisions, specifically section 11 requirements with respect to the content of enterprise agreements,[65] this vote confirmed the Government and the Xenophon party's continued commitment to this legislation.

CONSTITUTIONAL QUANDARY

This paradigm shift also suggests that fears about the Federal Government's capacity to legislate in respect of security of payment have finally been resolved. It is a trite proposition that a stream cannot rise higher than its source.[66] The Parliament cannot 'recite itself into power'[67] and every Act must be read and construed so as not to exceed the Commonwealth's legislative power in accordance with section 15A of the *Acts Interpretation Act 1901* (Cth). The passage of this legislation is an important development because it flies in the face of conventional wisdom which maintained for more than a decade that security of payment did not fit neatly under a Commonwealth head of power. It was left to states and territories to implement their own statutes and policies. As a result, security of payments law has become 'accident prone to difference'.[68]

Concerns have repeatedly been raised over whether the Commonwealth possessed sufficient legislative power to enact security of payments law without a referral of State powers

under section 51(xxxvii) of the Constitution.[69]

Despite the Cole Royal Commission's warning that 'the limitations on the Commonwealth's legislative power in this area should not overstated',[70] it has taken more than a decade for the Federal Government to act. Senator Xenophon alluded to these difficulties during parliamentary debate, noting that:[71]

There are constitutional issues as to whether we can actually amend this at a federal level, but what we can do is drive the reform with a security of payments working group, which is designed to complement the new section 11 of the Building Code.

A law may be supported by a combination of different heads of power.[72] Australian courts apply a two limb test to determine whether a Commonwealth law can be characterised as falling within a head of legislative power granted to the Parliament.[73] First, the courts consider the actual operation[74] of the law 'by reference to the nature of the rights, duties, powers and privileges which it changes, regulates or abolishes'.[75] Second, they consider whether the enactment in question has a sufficient connection to the authorised subject matter of the head of power.[76] Instruments, such as the Code, and subordinate legislation should be interpreted in accordance with the same principles used to construe Acts of Parliament.[77]

On the first question, the Act and the Code protect and regulate the rights of contractors to receive and recover payment for their work, supply of goods and services under construction contracts. Thus, this legislation regulates the duties and obligations of parties to honour their bargains and pay for work performed under construction contracts.

On the second question, the High Court has warned that:

... it is not enough that a law should refer to the subject matter or apply to the subject matter: for example, income tax laws apply to clergymen and to hotel–keepers as members of the public: but no–one would describe an income tax law as being, for that reason, a law with respect to clergymen or hotel–keepers.[78]

The connection must not be so:

... insubstantial, tenuous or distance that it cannot sensibly be described as a law with respect to a head of power.[79]

The motives of the legislators are irrelevant to characterisation;[80] what matters is what the Act actually does, and whether the connection is more:

... than an inference so incidental as not in truth to affect is character.[81]

Traditionally, the Corporations and interstate Trade and Commerce powers have been suggested as Constitutional sources of Commonwealth power for security of payments reform.[82] However, there are concerns that these heads of power would be insufficient to 'achieve universal coverage'.[83]

The Cole Royal Commission noted that the Commonwealth's legislative powers under sections 51(i) and 51(xx) of the Constitution extend 'to regulating any transaction in which at least one of the businesses is incorporated' but would not capture intrastate transactions between non–incorporated individuals.[84]

The Cole Royal Commission suggested that federal security of payments legislation could be expressly supported by the Commonwealth's legislative powers under sections 51(i) (Trade and Commerce), 51(xx) (Corporations) and 122 (Territories) of the Constitution.[85]

The Act and the Code appear to stick closely to this advice. Section 35(3) of the Act provides that the Code cannot require a person to comply with the Code unless that person is a constitutional corporation under section 51(xx) of the Constitution, a building industry participant carrying out work in a territory or Commonwealth place, or the person is the Commonwealth or a Commonwealth authority. Thus, the Code is within power.

The Senate Economic References Committee suggested in 2015 that there were three possible pathways for the Commonwealth to achieve uniformity between state and territory laws:[86] amending each security of payment regime to bring these into alignment; referring State powers to the Commonwealth under section 51(xxxvii) of the Constitution; or enacting Commonwealth legislation supported by a combination of powers, predominantly the Corporations and the interstate Trade and Commerce powers. The Society of Construction Law Australia has advocated for the third option as the most feasible approach,[87] conceding that 'some loss of coverage is an acceptable price to pay' for the implementation of national law.[88]

This legislation is a strong indication that the Commonwealth considers itself sufficiently empowered to legislate unilaterally in this space. To the extent that some unincorporated entities may not be subject by law to comply with the legislation, those entities may nevertheless still be contractually required to comply. For example, the ABCC has indicated that some of the Code's obligations will be contractually imposed on state agencies and

state owned corporations who receive Commonwealth funding to undertake building work, via a Joint Funding Agreement or the ABCC's model clauses.[89] Therefore, this legislation demonstrates that constitutional questions are no longer a serious impediment to federal security of payment reform.

CONCLUSION

Whether born of deliberate resolve or desperate political pragmatism, the *Building and Construction (Improving Productivity) Act 2016* (Cth) is the first occasion where the words 'security of payment' have appeared in a primary Commonwealth Act. The importance of this development should not be underestimated. Although the full force of these provisions may not be felt for some time, these reforms signal that after more than a decade of indecision, the Commonwealth Government is finally willing and able to legislate in respect of security of payment.

Admittedly, there remains much work to be done to overcome the confusion and parochialism that continues to undermine the efficacy of state and territory security of payments regimes. Importantly, the Act and the Code dispel longstanding doubts about the Commonwealth's capacity and willingness to legislate in this space, paving the way for the possibility of more wide–ranging reforms in future. Whatever the outcome of the Murray review, one thing is certain. The days when security of payment regulation was purely the domain of states and territories are well and truly over.

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DOES SAYING 'SORRY' HAVE A ROLE TO PLAY IN RESOLVING INTERNATIONAL CONSTRUCTION DISPUTES?

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INTRODUCTION

Lawyers practising in the field of resolving international construction disputes will be familiar with an armoury of schemes aimed at either avoiding or efficiently resolving disputes, such as dispute avoidance boards, dispute resolution boards, international arbitration, to name a few as well as various alternative dispute resolution schemes.

Does saying 'sorry' have a role to play? The recent[1] passing of the Apology Bill by the Hong Kong's Legislative Council, the first Asian jurisdiction to have enacted this type of legislation, provides a timely reminder of the oft–forgotten value of an apology as a means of settling disputes. In general terms, apology laws aim to help people settle disputes by clarifying the legal effect of making an apology and often operate by excluding evidence of an apology, which in doing so removes or reduces the fear of apologising by eliminating the legal consequences of an admission of liability.

The Hong Kong Apology Bill provides that an apology does not constitute an admission of fault or liability and is not admissible in evidence. Such legislation is not new and has been enacted in more than 50 jurisdictions, including Canada, England and Wales, the United States and Australia.[2] The extent of protection that apology law provides varies between jurisdictions. Lawyers involved in international construction dispute resolution should be aware of the benefit that apologies can have in the settlement of disputes, the different apology legislation and how it may be utilised.

Depending on the governing law and the scope of any apology legislation, saying sorry may be a cost efficient means to ease tensions and resolve disputes for parties to a construction dispute.

BACKGROUND

In general, an apology is an expression of sympathy or regret, which may be accompanied by an acknowledgement of fault. There are a myriad of reasons why someone might choose to apologise, such as feelings of empathy or guilt. Some people may choose to be strategic, and use an apology to placate a potential claimant.

However, the making of apologies can have legal consequences, where they are construed as admissions of fault and admitted into evidence. Apology laws are designed to eliminate the legal barrier to apologising in order to promote dispute resolution.

In Australia, the New South Wales and Australian Capital Territory legislation provide the greatest protection for apology makers.

The New South Wales Act provides that an apology:

• *does not constitute an express or implied admission of fault or liability by the person in connection with that matter, and*

• *is not relevant to the determination of fault or liability in connection with that matter.*[3]

It further stipulates that evidence of an apology is not admissible.[4]

However, whether making an apology is in fact the best approach requires a deeper understanding and consideration of some of the issues discussed in this article below.

WILL MY APOLOGY BE PROTECTED?

Whether you are seeking to express remorse or attempting to deescalate a potential dispute, you should be aware of the extent to which you will be protected in making an apology. The extent of protection varies between jurisdictions. Important variations include whether:

The content of the apology should be carefully composed so as to not include admissions of fault or fact, unless they are covered. The apology maker should also ensure that their insurance policy will not be compromised. Taking all these factors into account, apologising can be a valuable means to help resolve disputes and reduce litigation even in a commercial context.

• the scope of matters caught by the legislation is narrow or broad;

• admissions of fault are protected;

• admissions of fact are protected; and

• making an apology adversely affects insurance coverage.

At one end of the spectrum, the New South Wales *Civil Liability Act* provides that the apology regime 'applies to civil liability of any kind' with the exception of certain excluded civil liabilities (e.g. intentional acts done with intent to cause injury or death).[5]

At the other end, the Northern Territory's apology law is confined to civil actions for personal injury.[6] This could mean that, in a construction context, under Northern Territory law, whether it is legally prejudicial for a negligent design engineer or architect to make an apology for his/her negligence in design work may depend on whether such work resulted in personal injury, as that may determine whether the evidence of an apology is protected and can be excluded from evidence.

Secondly, whether admissions of fault are protected will depend largely on how 'apology' is defined in the legislation. In New South Wales, the Australian Capital Territory and Queensland, the definition of apology include an admission of fault.[7]

Whereas the Victorian Act, specifically provides that an apology 'does not include a clear acknowledgement of fault'.[8] Depending on the jurisdiction, careful consideration should be given to the content of an apology.

Thirdly, the extent to which admissions of fact are protected will depend on the scope and intent of the apology laws. This will in turn determine, for example, whether an entire letter of apology is excluded from evidence, or whether certain parts of the letter are found to be admissible because they constitute admissions of fact. Under the Hong Kong Apology Bill; the definition of 'apology' includes:

... a statement of fact in connection with the matter.[9]

By virtue of this definition, the protection afforded to apologies will cover statements of fact. However, the Bill also contains an exception whereby:

... if in particular applicable proceedings there is an exceptional case (for example, where there is no other evidence available for determining an issue), the decision maker may exercise a discretion to admit a statement of fact contained in an apology as evidence in the proceedings, but only if the decision maker is satisfied that it is just and equitable to do so, having regard to all the relevant circumstances.[10]

Consequently, caution should be exercised in including admissions of fact in apologies.

Lastly, it is common practice amongst insurers to include in a contract of insurance a clause that prohibits an admission of fault by the insured party, without the insurer's consent. Therefore, fear of voiding or adversely affecting insurance policies is likely to contribute to the overall reluctance to apologise in disputes.

To overcome this barrier, the Hong Kong Apology Bill provides that an apology:

... does not void or otherwise affect any insurance cover, compensation or other form of benefit.[11]

Similar protection does not exist under the Australian apology laws.

VALUE OF APOLOGISING IN THE CONSTRUCTION INDUSTRY

Whilst in a sector such as the construction industry decisions are often driven by bottom lines, research has found[12] that apologies influence claimants' perceptions, judgments, and decisions in ways that can make settlement more likely—for example, altering perceptions of the dispute and the disputants, improving expectations of future conduct and the relationship between the parties, changing negotiation aspirations and fairness judgments, decreasing negative emotion and increasing willingness to accept an offer of settlement.

Feelings of injustice and anguish can often manifest in a desire to bring proceedings, even if the economics do not warrant it. An apology may assist in achieving settlement more quickly and amicably because while a monetary payment in damages can compensate for financial losses, it cannot compensate for feelings of injustice. Particularly, where settlement becomes more likely an apology may push parties closer to a accepting a compromise in circumstances where they would not otherwise.

CONCLUSION

With apology legislation enacted in over 50 jurisdictions, including Australia and most recently Hong Kong, greater thought should be given to the benefits of apologising within the construction industry. However, as outlined above, there are significant jurisdictional differences which may affect whether an apology is protected. As a starting point, the apology maker must ensure that their matter falls within the scope of the applicable legislation.

The content of the apology should be carefully composed so as to not include admissions of fault or fact, unless they are covered. The apology maker should also ensure that their insurance policy will not be compromised. Taking all these factors into account, apologising can be a valuable means to help resolve disputes and reduce litigation even in a commercial context.

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RIGHTS ON INSOLVENCY RESTRICTED IN RECENT AMENDMENTS TO THE *CORPORATIONS ACT 2001* (CTH)

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INTRODUCTION

Recent amendments to the *Corporations Act 2001* (Cth) have introduced a prohibition on the enforcement of ipso facto clauses in certain circumstances.

The Federal Government has for some time considered amendments to the insolvency regime in the *Corporations Act 2001* (Cth) to streamline the recovery of businesses in financial distress.

WHAT ARE IPSO FACTO CLAUSES AND HOW DO THEY WORK?

Ipso facto clauses are designed to typically allow for the termination of a contract if the other party to the contract enters into an insolvency. Such clauses are standard in many commercial and financial contracts (including construction contracts), and considered essential to protect the interests of the contracting parties as it allows them to control the contractual relationship in those circumstances.

The policy behind the prohibition is to maximise the chance of businesses in financial distress to either trade their way out of trouble, or find a purchaser, without having to worry about essential contracts being terminated or having onerous terms imposed.

If a right arises by express provision of a contract, agreement or arrangement, that right cannot be enforced against a corporation for the reason that:

- it enters into voluntary administration;
- a managing controller (which includes a receiver and manager) is appointed over the whole or substantially the whole of the corporation's property; or

While the amendments are clearly aimed at staying enforcement of rights to terminate or onerously amend contracts on the insolvency of a counterparty, the terms of the new provisions are not restricted to those specific types of rights.

• it publicly announces that it will be making an application to enter into a scheme of arrangement for the purpose of avoiding being wound up in insolvency.

While the amendments are clearly aimed at staying enforcement of rights to terminate or onerously amend contracts on the insolvency of a counterparty, the terms of the new provisions are not restricted to those specific types of rights. Instead, the reason for the triggering of the right is used as the qualification for the stay. That is, if one of the trigger events occurs, any contractual rights arising as a result cannot be enforced.

CONSTRUCTION INDUSTRY PARTICIPANTS SHOULD BE AWARE OF THE IMPLICATIONS

As a practical example, many construction contracts will typically contain a right for the principal to terminate the contract or to take works out of the hands of the builder upon the insolvency of the builder.

Similar provisions typically exist in subcontracts too. Under such contracts entered into after the commencement of these amendments, a party may not be able to rely upon such rights in the event of the occurrence of one of the events referred to above, such as the appointment of a voluntary administrator to the downstream party.

Although it is yet to be seen, the prohibition may in fact go further and apply in circumstances of general insolvency which are factually consequent upon the occurrence of one of these events. This is a fundamental shift from the current position and one that will require the careful attention of drafters of contracts.

AMENDMENTS TO STAY ENFORCEMENT OF IPSO FACTO CLAUSES

There is a recognition that the stay should not apply to certain types of agreements, usually for reasons of commercial efficacy, such as complex financial arrangements, netting agreements, aircraft leases and rights of set off. The exceptions will be contained in Regulations, allowing types of agreements to be excepted without the need for legislation.

Interestingly, removal of trustee provisions in trust deeds are expected to be excepted. As this is a common cause of unnecessary complication in administrations of corporate trustees, it is disappointing that these provisions are to be excepted.

Additionally, clauses that exempt financiers from a requirement to provide further funding following an insolvency event will not be caught by the prohibition.

The stay on enforcement will be limited in time or to the duration of the external administration, and is subject to court order.

The amendments to stay enforcement of ipso facto clauses are designed to reduce the incidence of otherwise viable businesses failing, and can be considered complementary to the introduction of a safe harbour regime for directors of companies facing insolvency.

HOW TO PREPARE FOR AMENDMENTS TO THE *CORPORATIONS ACT 2011* (CTH)

The amendments come into force on 1 July 2018, unless the Act is proclaimed earlier. The provisions will apply to contracts entered into after this date.

Such contracts will need to be carefully reviewed in light of the legislative changes to seek to protect parties' legitimate interests without falling foul of the ipso facto stay provisions.

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NO NATIVE TITLE FOR BRISBANE—CERTAINTY FOR INFRASTRUCTURE PROPONENTS AND OTHER DEVELOPERS?

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INTRODUCTION

The Full Federal Court has confirmed that native title no longer exists anywhere in Brisbane.

While the recent clarification from the Full Federal Court that native title no longer exists over Brisbane will be welcomed in some quarters, it may prove to be the cause of uncertainty in other areas—particularly in relation to Aboriginal cultural heritage.

WHAT JUST HAPPENED?

In early 2015, Justice Jessup determined that native title does not exist in relation to any part of the area subject to native title claims brought on behalf of the Turrbal People and Yugara People (see *Sandy on behalf of the Yugara People v State of Queensland (No 2)* [2015] FCA 15 and *Sandy on behalf of the Yugara People v State of Queensland (No 3)* [2015] FCA 210). The combined claim area covered the bulk of the Brisbane metropolitan area.

Separate appeals brought by the native title parties were heard together by the Full Court of the Federal Court in November 2016. The Full Court handed down its judgment, dismissing both appeals, on 25 July 2017 (*Sandy on behalf of the Yugara People v State of Queensland* [2017] FCAFC 108).

REASONS—CONNECTION AND FINALITY

The Full Court agreed with the primary judge that neither of the appellants could demonstrate that they were:

- the biological descendants of apical ancestors who were present in the claim area at sovereignty; or
- members of a continuing society who, through successive generations since sovereignty, had continued to acknowledge and observe the traditional laws and customs by which they were connected to their claim area, and under which their native title rights and interests were said to be possessed.

While the Full Court acknowledged that the actions of settlers may have contributed to this interruption of connection, the court adverted to longstanding authority (e.g. *Bodney v Bennell* [2008] FCAFC 636) in finding that the 'explanation of forced removal … is not directly relevant to the continuity finding'.

For these reasons, neither of the appellants could obtain a determination that they hold native title in the claim area. The question, then, was whether the primary judge was right to further determine that native title did not exist at all over Brisbane.

The Full Court held that *CG v Western Australia* [2016] FCAFC 67 'authoritatively affirmed' that the Federal Court has the discretionary power to make a negative determination of native title.

In light of the long history of (unsuccessful) overlapping claims to the Brisbane metropolitan area, and the available anthropological research into the continuity of (any) traditional society in Brisbane, the Full Court agreed with the primary judge that there was no real prospect of other groups having potentially viable claims over the area.

The determination that native title does not exist over Brisbane therefore advanced the strong public interest in the finality of litigation.

WHAT THE NEGATIVE DETERMINATION OVER BRISBANE MEANS FOR PROPONENTS

For over two years, developers of projects in the Brisbane area have had to allow for the possibility of the negative determination being reversed on appeal.

The Full Court's decision brings welcome certainty for such proponents (subject to any application for special leave to appeal to the High Court).

Ordinarily, a project proponent would need to consider whether statutory approvals or grants of tenure over land and waters (including the Brisbane River) would 'affect native title'. Any such approval or tenure would only be valid, to the extent it does affects native title, if it was covered by an applicable procedure in the *Native Title Act 1993* (Cth).

The negative determination over Brisbane means there is no longer a need to comply with any such procedures, resulting in both financial and time savings for proponents.

The negative determination does not, however, mean that proponents no longer need to comply with their obligations to avoid harm to Aboriginal cultural heritage.

FUTURE CONSULTATION WITH ABORIGINAL PARTIES

All land users have a duty of care to take reasonable and practicable measures to avoid harm to Aboriginal cultural heritage. This obligation applies everywhere, not only in relation to areas where native title may exist. The obligation therefore continues to apply in Brisbane.

Compliance with the 'cultural heritage duty of care' typically requires consultation (and often also agreement) with the applicable 'Aboriginal party'. Where there are no current registered native title holders or claimants for an area, the Aboriginal party will be the claimant for the last of the registered claims over the area to have failed.

There are two Aboriginal parties for most of Brisbane, being the former registered claimants for the Turrbal People and Jagera People #2 claims.

Ordinarily, an Aboriginal party who is a former registered claimant will be replaced as Aboriginal party by a new registered claimant over the same area. The consequence of the negative determination over Brisbane, however, is that there can be no new native title claims over Brisbane. There is therefore no prospect of the current Aboriginal parties being replaced.

While this is of no immediate consequence, issues will be raised over the medium term as the members of these Aboriginal parties inevitably advance in years and pass on. The *Aboriginal Cultural Heritage Act 2003* provides for Aboriginal parties in these circumstances to be succeeded by the members of their old native title claim groups. How this succession will work in practice (including with regard to issues such as who will need to execute cultural heritage management plans or other agreements in these circumstances)—particularly if the old native title claim group has become dysfunctional—is an emerging issue, and legislative, judicial or policy guidance will be required.

So, in summary, while the recent decision brings certainty today, uncertainty is likely to again confront project proponents in the foreseeable future.

Mark Geritz and Tosin Aro's article was previously published on the Clayton Utz web site—August 2017. Published with permission.

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MISLEADING AND DECEPTIVE CONDUCT IN CONSTRUCTION PROJECTS—LIMITING LIABILITY UNDER THE AUSTRALIAN CONSUMER LAW THROUGH YOUR CONSTRUCTION CONTRACT

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INTRODUCTION

In 2006, a contractor tendered to construct a spillway for a dam. The principal prepared the tender documents, which represented to the contractor that no plans were available of the embankment or any outlet pipe. The embankment and outlet pipe was critical in the context of the contractor's ability to assess the extent of excavation required to construct the spillway. In the absence of available plans, the contractor relied on a geotechnical report (forming part of the tender documents) in preparing its tender.

The contractor was subsequently awarded the contract and soon discovered that its excavation costs would significantly exceed what it had estimated in reliance on the geotechnical report provided by the principal.

Contrary to what was stated in the tender documents, it was discovered that the principal did hold plans of the embankment and the outlet pipe. Further, the geotechnical report upon which the contractor relied was incorrect. The contractor sued the principal for misrepresentation under the *Trade Practices Act* 1974 (Cth) ((TPA) as it was then known). The court found that the principal had engaged in misleading and deceptive conduct under the TPA. The extra costs incurred by the contractor as a result of the principal's misrepresentation meant that the principal was liable to pay for those losses.

This is a summary of the facts in the well–known case of *Abigroup Contractors Pty Ltd v Sydney Catchment Authority (No. 3)*.[1]

However, what if the construction contract between the two parties contained a clause capping the liability of the Sydney Catchment Authority to a prescribed amount? What if the contract also obliged the contractor to notify the Sydney Catchment Authority of its potential claim within (say) one year, or commence proceedings for the claim within one year?

Conceivably, the Sydney Catchment Authority might have been in a different position. On the other hand, such clauses might have been declared void in the eyes of the court on the basis that parties cannot contract out of the statutory consumer protection framework.

This paper examines the validity of such 'limitation of liability' clauses in the context of a construction project, and analyses a number of trial judge cases which have upheld a party's ability to limit their liability. The paper will first discuss the impact of misleading and deceptive conduct claims on the construction industry, drawing on case examples in relation to delay, scope, latent conditions, construction costs and payment disputes. It will be argued that the impact of misleading and deceptive conduct claims on the construction industry is so significant that the validity of limitation of liability clauses ought to be properly examined by appellate courts or the legislature.

The paper will then discuss some of the mechanisms that parties insert into their construction contracts in an attempt to limit their liability. Following this, the paper will closely examine the small number of trial judge cases which have ruled that limitation of liability clauses do not amount to contracting out of the statutory consumer protection framework. The paper will then go on to discuss some of the risks inherent in limitation of liability clauses, including the introduction of the Unfair Contract Terms[2] and case law surrounding time bars in construction contracts.

Overall, it is the author's view that clauses attempting to limit a party's liability for misleading and deceptive conduct should be upheld by the courts as valid and enforceable in the context of freedom of contract. It is the author's view that this issue is due for either legislative intervention or a close examination before an appellate court.

AUSTRALIAN CONSUMER LAW

LITIGATED SECTIONS

The impact of claims for misleading and deceptive conduct on construction projects is significant. Two sections of the Australian Consumer Law[3] (and the respective sections of its predecessor, the TPA) have been the subject of significant litigation in the construction industry.

The first is section 18(1), which provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive. The second is section 4 which provides that a representation as to a 'future matter' is misleading if it is made without reasonable grounds. These sections are examined in detail below, in the context of the construction industry.

CONSTRUCTION CLAIMS UNDER ACL

Parties in the construction industry may seek to rely on section 18 of the ACL to bring claims outside of the scope of the construction contract between the parties, and the section can apply to conduct before, during, or after the formation of the contract.[4] It can give rise to a broad and flexible range of remedies under the ACL, which may not otherwise be available under the construction contract.[5]

Typically, claims for misleading and deceptive conduct are added into a number of other contractual claims in the context of a construction dispute to widen the range of available remedies.[6]

Claims for misleading and deceptive conduct in construction matters frequently arise out of tender situations, where the contractor accuses the principal of providing misleading information in relation to soil or site conditions.[7] A party alleging misleading and deceptive conduct must show that they suffered loss as a result of the conduct.[8]

Misleading and deceptive conduct claims may also be brought by the contractor to argue that any delay to the construction program was not in fact the contractor's fault.[9] In this regard, a contractor may seek to rely on a representation of the principal prior to entering into the contract (such as forecasts or critical path programs during the tender phase and used in pricing the work) to prove loss.[10]

This section will outline how claims under the ACL can be framed in the context of a construction project, emphasising the impact these claims will continue to have on the construction industry. The author queries whether limitation of liability clauses—including monetary caps and temporal limits—might be utilised by parties to reduce their exposure to the types of claims pursued in the case examples below.

DELAY

ACL claims may be brought by a party to shift liability for delay in a construction project, notwithstanding the specific contract clauses allocating risk for delay. Relevantly, the decision in *Baulderstone Hornibrook Pty Limited v Qantas Airways Limited*[11] demonstrates that'a contractual risk allocation regime is a relevant factor in determining whether a party has contravened section 52'.[12]

In that case, the dispute concerned extension work at the Domestic Terminal, involving the construction of an extension to the existing terminal building; the construction of a new valet car park; and the construction of a new concourse extending out onto the airport apron area for parking aircraft.[13] Qantas engaged Baulderstone to construct the extension to the terminal building and the new valet car park and concourse. Baulderstone alleged that Qantas engaged in misleading and deceptive conduct in contravention of section 52 of the TPA.[14]

This was on the basis of tender information given to Baulderstone prior to entering into the contract which included a program with stages of work to be carried out by contractors.[15] The program in question contained a note to the following effect:

... Please be advised that a programme of FAC works and four (4) drawings related to the construction of the elevated roadworks are issued for you FOR INFORMATION ONLY. This information may be useful for your tender preparations.[16]

The court, in assessing the factual matrix of the case, looked at all of the contractual documentation to examine risk allocation. It was apparent that the 'contract entered into by the contractor would be heavily weighted against it'[17] and that most of the risk associated with the project was to be borne by the contractor.[18] Notwithstanding this, Baulderstone alleged that Qantas had made several misleading and deceptive representations by way of provision of the construction program which indicated when they would be granted site access (which impacted on its own timetable) and that this caused them to suffer loss.[19]

The court stated that:

… a works program, especially a program which is not contractually binding may, when prepared by a contractor, be little more than a statement of intention or a statement that the contractor will use his best endeavours to comply with it. If prepared by an owner, a works program may be more than a statement of expectation; it may be said to contain a timetable which is regarded as feasible. But, in each case, the program will always be regarded as subject to the ever present risk that the project may be delayed or disrupted for a myriad of reasons, including reasons that may be beyond the control of the parties.[20]

The court found, in examining the factual matrix of the documents provided by Qantas, that the program did not constitute a representation which was misleading or deceptive; that the program was not adequate to rely upon in preparing Bauderstone's tender; and that the fact it was labelled as 'information only' should have indicated to Baulderstone that the program was unreliable. Lloyd suggests that this case demonstrates a court's potential inclination to give weight to the fact that 'the contract largely allocated risk for delay and disruption to the contractor' in ruling Qantas was not at fault.

SCOPE

Parties can also enlist the assistance of the ACL in relation to variations to the scope of work. Whilst the claimant was not ultimately successful in this particular instance, a good example of how parties can frame claims as to scope is that of *Multicon Engineering Pty Limited v Federal Airports Corp*.[21] In that case, the Federal Airports Corporation engaged Multicon Engineering (a tenderer) to carry out redevelopment work at Sydney International Airport, to supply and erect structural steelwork.

Multicon Engineering commenced proceedings against the Federal Airports Corporation claiming that the Federal Airports Corporation had breached section 52 of the TPA in its pre–contractual negotiations, based on the fact that the Federal Airports Corporation:

... was aware—but failed to advise MCE—of various changes to the information upon which MCE had based its tender submission, including substantial changes to the design documentation.[22]

The court, agreeing with the referee, said that:

... at the time of the contract Multicon knew that the design was not complete, and that the contract provided for any additional work to be dealt with as a variation.[23]

The court also agreed with the referee's view that variations were unavoidable in a project of that scale, and that:

... silence as to changes pre–contract but after tender is to be expected as a matter of commercial practicability.[24]

That said, disclosure of the variations provisions of the contract prior to parties entering into that contract did not eliminate or reduce the misleading and deceptive nature of the Federal Airports Corporation's silence.[25]

The court ultimately concluded that whilst the Federal Airports Corporation knew variations would be required prior to the contract being entered into, Multicon had not proved that the Federal Airports Corporation made a representation to the effect that variations would not be required.[26] That, together with the finding that Multicon did not actually suffer loss or damage insofar as the statute could compensate it, meant that Multicon was not successful in its claim for misleading and deceptive conduct.[27]

LATENT CONDITIONS

A further instance in which parties may rely on the provisions of the ACL is in relation to liability for latent conditions. This was well demonstrated in the case described above in *Abigroup*.[28] In that case, Abigroup won a contract with the Sydney Catchment Authority to build a spillway under a lump sum contract in which Abigroup wore all risks, including the cost of work not included in the contract but which was required to bring the project to completion.[29] The contract provided that additional work might be needed due to site conditions.[30] Abigroup encountered difficult site conditions, as a result of the rock level in part of the creek area being substantially lower than that indicated in the design drawings and technical specifications.[31]

Abigroup claimed that it suffered a loss as a result of having to do the additional work, and that that loss was caused by the Sydney Catchment Authority making a representation that it had no plans of an outlet pipe that drained water through an embankment over the creek when in fact there was such a plan.[32] Abigroup argued that if it had known of the existence of the plan, further enquiries would have revealed the rock levels, shown in the design and specs, to be 'seriously flawed'.[33]

Abigroup commenced proceedings against the Sydney Catchment Authority alleging misleading and deceptive conduct contrary to section 52 of the TPA. Abigroup argued that, having been induced to enter into the contract by the Sydney Catchment Authority's misrepresentation which committed it to do significantly more work than was allowed in the lump sum contract, it was entitled to damages being the cost of doing the additional work, pursuant to section 82 of the TPA.[34]

Abigroup also claimed relief under section 87 of the TPA, for damages for breach of contract, for delay and avoidance of liquidated damages.[35]

The court agreed that the Sydney Catchment Authority's representation was misleading and deceptive. The court stated that Abigroup was 'induced by the belief that there was no plan of the outlet pipe' and that it 'tendered for and entered into a contract for a lump sum with a fixed date of completion which did not adequately allow for the extent of work actually required in the Folly Creek area'.[36] The court said that if Abigroup had known the true position then it would not have entered into the contract.[37] The court found that Abigroup had suffered loss in having to complete the additional work under the fixed price contract.[38]

CONSTRUCTION COST ESTIMATES

If an estimate of construction costs is prepared without reasonable grounds, a party may be able to rely on the ACL to recover their losses. This was well demonstrated in the case of *Doepel & Associates Architects Pty Limited v Hodgkinson*,[39] where an architect had estimated construction costs to be within a range of $390,000 AND $400,000. In actual fact, construction costs reached around $630,000.

The Court of Appeal by majority found that the estimated range had been made without reasonable grounds and was therefore misleading and deceptive.[40]

Doepel consulted a document published by quantity surveyors known as the 'Pocket Compendium' which contained estimates of building costs.[41] Doepel chose a significantly low rate from the Compendium based on their assessment that:

(a) there would be no builder's margin,

(b) a belief that Hodgkinson was likely to achieve trade discounts due to his position, and

(c) because of the cost of construction of a predesigned house next door.[42]

Evidence was presented to the court to the effect that predesigned project homes (such as the one next door) were generally constructed at a significantly lower cost than houses designed by architects for the specific requirements of a client.[43] Further, the court said that there was no basis for adopting the assumption in relation to Hodgkinson's ability to obtain a discount on trades.[44]

The court stated that:

... a party who has been subjected to misleading and deceptive conduct or negligent misrepresentation is entitled to be put in the position in which he or she would have been but for the breach of statutory or common law duty.[45]

The court went onto describe the circumstances in which it can be shown that a different course of action would have been taken 'but for' the breach, stating that 'the measure of damages is the sum required to put the innocent party, in this case Mr Hodgkinson, in the position in which he would have been but for the relevant breach of duty'.[46] There have also been other cases where construction cost estimates made without reasonable grounds have landed a party in trouble.[47]

PAYMENT DISPUTES

Recently, the Federal Court found that a company officer who swore a statutory declaration in support of a payment claim made under the *Building and Construction Industry (Security of Payment) Act 2002* (Vic) was in contravention of section 18 of the ACL.[48]

In that case, Reed Constructions prepared a payment claim for the principal (470 St Kilda Road Pty Ltd, the applicant in the matter).[49] The CEO of Reed (Mr Robinson, the respondent) swore in the supporting statutory declaration that, inter alia, it was made to the best of his knowledge and belief having made all reasonable enquiries, and that all subcontractors who were engaged to work had been paid in full all amounts payable to them under terms of the relevant subcontracts.[50]

The payment claim was put through adjudication[51] (the details of which are not relevant for the purposes of this paper), then Reed Constructions went into liquidation following an application for judicial review.[52] The applicant sought to recover the amount of the payment claim from the CEO of Reed Constructions personally, by way of damages, under the ACL. The applicant argued that by making the statutory declaration, Mr Robinson represented a number of matters that were not true.

The court agreed that no reasonable enquiries were made pursuant to the statutory declaration, and that it was clear from the evidence that despite having access to the relevant accounts software system which recorded the payment terms of the subcontractors and suppliers, Mr Robinson failed to check that information prior to making the statutory declaration.[53] The court said Mr Robinson also failed to check any accounts or monthly reports, which were also readily available to him.[54]

The court concluded that Mr Robinson engaged in misleading or deceptive conduct by virtue of his declaration—and that the statements made were 'materially untrue'.[55]

GOOD PUBLIC POLICY OR FREEDOM OF CONTRACT?

Australian consumer law is underpinned by an overarching public policy to prevent anti–competitive or harmful conduct to (often vulnerable) consumers and the promotion of fair markets.[56] Ramsay argues that consumer laws are driven by a desire to prevent 'inequality in bargaining power' and encourage the fair regulation of consumer markets (including accountable decision making).[57]

One of the questions posed by this paper is, how far do these concepts apply insofar as dealings between parties in the construction industry? And is there merit in categorising the construction industry as another consumer market consisting of 'vulnerable' players? These questions are important in light of the context of this paper, and whether limitation clauses should be upheld as valid by appellate courts.

Misleading and deceptive conduct claims in the construction industry amount to significant sums of money and represent a very real risk for industry participants.[58] Whether or not a party can limit their liability under the ACL is therefore an important issue because it directly impacts on risk allocation in construction projects and if used effectively, can provide more certainty in terms of residual risk arising out of a project.

To examine the issue more closely (that is, whether a party should be able to limit its liability for misleading conduct claims) it is the author's view that there may be merit in reviewing the principles behind classical contract theory (and perhaps even economic analysis of contract law)[59] underpinning the development of general contract law.

CONTRACT THEORIES

Up until the introduction of the unfair contract terms (discussed in detail further below) the position at law has been that the 'contract is king'.[60] Such a position is founded by the principle that 'justice requires that men, who have negotiated at arm's length, be held to their bargains'.[61] In other words, courts or other authorities should not intervene in an agreement struck between two parties on equal footing. Classical contract theory underpins these principles.

Classical contract theory emphasises freedom of contract, which requires that 'contractual obligations be voluntarily assumed by contracting parties'.[62] One of the classical contract theories—the will theory—says that 'a contract represents an expression of the will of the contracting parties, and for that reason should be respected and enforced by the courts'.[63] The importance of parties being able to enter into contracts freely, and for courts not to interfere with whatever arrangements parties had agreed upon, was central.[64] As Sir George Jessel said in *Printing and Numerical Registering Co v Sampson*:

If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by courts of justice.[65]

The development of classical contract theory was criticised by some, because of the unfortunate realisation that contracts did not always represent the will of the parties.[66] That, together with the theory's presumption that contract terms are negotiated between the parties, when in fact many contracts are standard or pro forma type contracts which are rarely negotiated and perhaps not even reviewed by one or more of the parties.[67] It is arguable that the Unfair Contract Terms[68] were enacted in response to the flaws of classical contract theory in this regard, on the belief that 'most exchanges are entered into under constraints as to either available trading partners or, even more commonly, the terms of trade'.[69]

From those criticisms, a number of other contract theories developed, including the consent theory[70] to deal with the shortcomings of classical contract theories. However, could classical contract theory still have a place in the construction industry? Particularly, in support of the proposition that parties should be able to agree on limitations and caps to their liability in respect of statutory schemes like the ACL?

ARE CONTRACT THEORIES REALLY RELEVANT TO CONSTRUCTION?

Classical contract theory emphasises freedom of contract and limitation of state intervention.[71] In the context of a construction project, these principles appear to be disappearing more and more. Construction projects are governed by a number of statutory frameworks including consumer protection laws, security of payment, residential building codes, licensing requirements, work health and safety and professional standards legislation—to name a few.[72] Noting the high risk involved in construction projects and importance of public accountability, the government has taken an active role in developing laws to facilitate and regulate how projects are run.

It is the author's view that a balance may be achieved by way of limitation of liability clauses. Classical contract theories as applying to construction projects demonstrate that parties can agree

to limit or accept certain liabilities at their own free will. Frequently (though not always), parties to construction contracts are business people with knowledge and experience working in the construction industry.[73] Participants are not generally vulnerable consumers who need to be protected from corporate giants, and to the extent that they are, the Unfair Contract Terms should offer protection.

It is arguable that a clause that purports to limit liability for misleading and deceptive conduct should be permitted in the context of freedom of contract. Such clauses do not oust the regulatory framework that has developed around construction projects, rather it cements the extent of liability each party has agreed to take on in relation to the relevant statute.

MECHANISMS TO LIMIT LIABILITY

There are a number of mechanisms parties (and their lawyers) can implement to attempt to limit liability for claims, including for misleading and deceptive conduct. The question of whether or not those mechanisms would be ruled invalid is addressed further below.

NO RELIANCE

Lawyers frequently insert 'no reliance' clauses to ensure that any material or representations given by their client prior to entering into the contract cannot be relied upon by the other party. No reliance clauses are not always effective at limiting liability.[74] In the case of *Campbell v Backoffice Investments Pty Ltd*,[75] the court said that a no reliance clause will not necessarily prevent conduct from being found to be misleading or deceptive.[76] The court said that this will be a question of fact to be decided by reference to all the relevant circumstances.

TEMPORAL LIMITS

A temporal limit may be inserted by way of a clause which (for example) provides that claims 'under the law of contract, tort or otherwise'[77] are barred following a certain period of time expiring. Some temporal limits may impose specific procedural and timing notification requirements, for example by providing that a party with a potential claim has to notify the other party within a certain period of time, and commence proceedings within another period of time after that. As will be seen further below, temporal limits have recently been upheld by trial judges as valid and not ousting the operation of the statutory consumer framework. The difficulty with temporal limits (for lawyers at least) is trying to ensure that the clause is broad enough to capture ACL claims whilst treading the risk of being too specific and therefore declared invalid by a court.

MONETARY CAPS

Monetary caps impose an upper limit on the amount a party can claim back at a later stage for breach. The cases below, as will be seen, appear to support the proposition that parties can agree to monetary caps on liability for misleading and deceptive conduct claims. However, each of the cases below contains only obiter dicta regarding monetary caps[78] and there is yet to be precedent developed in this area.

LIMITING LOSSES

Lawyers can further attempt to limit the liability of their clients in construction contracts by purporting to exclude consequential and/or indirect loss (for example, claims for loss of profits, loss of business etc.). Such losses are those that would have been reasonably expected to be the probable result of such a breach, at the time the parties entered into the contract.[79]

The High Court has upheld a party's ability to exclude certain damages, providing that the interpretation of the clause is determined by:

... construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity.[80]

Difficulties arise when parties do not explicitly spell out what types of losses they intend the clause to exclude.[81]

WHAT THE COURTS SAY

It is settled law that parties cannot contract out of the ACL or exclude liability for misleading and deceptive conduct claims. However, a handful of trial judge cases over recent years indicate that parties may be able to limit their liability in respect of ACL claims, by imposing monetary caps or temporal limits. To date, no cases have been heard before appellate courts in relation to this issue.

PARTIES CANNOT CONTRACT OUT OF ACL

It is settled law that parties to contracts (construction or otherwise) cannot exclude the operation of the ACL. This was made clear by the Full Federal Court in *Henjo Investments Pty Ltd v Collins Marrickville Pty Ltd*,[82] where the court said that parties cannot use exclusion clauses to 'oust the effect of the [TPA] or deprive an applicant of remedies under it'.[83] If misleading or deceptive conduct is found to have taken place, with the effect that loss has been suffered from relying on the relevant conduct, then any clause attempting to oust the operation of the consumer law will not be effective.[84]

On the issue of clauses purporting to exclude the operation of the statutory framework (exclusion clause), courts have adopted the view that an exclusion clause 'cannot defeat a section 52 claim unless… [it] has the effect of altering the character of the conduct so that it is no longer misleading'.[85] For example, a clause that states that a principal's omission of certain information or documentation is not misleading is not a clause that ousts the operation of the ACL (it simply alters the conduct of the principal so that it is no longer misleading). On the contrary, exclusion clauses purporting to exclude liability for misleading and deceptive conduct altogether will not be effective.[86]

That said, whether or not parties can limit their liability for misleading and deceptive conduct claims remains unaddressed by appellate courts. Indeed, courts at the trial judge level have responded positively to such clauses, upholding them on the basis that parties entered into the contracts freely and on equal bargaining positions.

LIMITING LIABILITY DOES NOT EXCLUDE ACL

Case law indicates that a general consensus may be developing to the effect that clauses limiting a party's liability for misleading and deceptive conduct does not amount to contracting out of the ACL. It would appear that clauses seeking to limit liability in construction contracts need not contain an express reference to claims for misleading and deceptive conduct, and can be expressed as limiting liability 'under the law of contract, tort or otherwise'.[87] Courts have held these types of clauses to be sufficiently broad enough to capture ACL claims. This paper will now go onto analyse the recent trial judge cases, which have upheld a party's right to limit their liability under the ACL.

PARTIES MUST BE ON EQUAL FOOTING

In *Owners SP 62930 v Kell & Rigby*,[88] McDougall J of the New South Wales Supreme Court was asked to rule on a party's ability to limit its liability for misleading and deceptive conduct claims in the context of a construction matter. The plaintiff was the Owners Corporation (OC) of a strata title development at Kirribilli NSW. The OC claimed that the building work was defective to the extent of $1.2 million, $250,000 of which was claimed to be related to defective mechanical services.[89]

The OC commenced proceedings against the builder and the developers to recover damages for the alleged defects. The developers joined a firm of engineers as a cross–defendant, who had responsibility for the mechanical services. The developers alleged that the firm of engineers acted misleadingly or deceptively by approving the 'as installed' drawings furnished by the subcontractor Quitstar who carried out the works.

The cross claim asserted that the misleading or deceptive conduct was constituted by a representation said to arise from a letter which read 'the Quitstar as–installed drawings submitted on 9 May 2000 are approved. Please submit a copy of the manuals'.[90] The developers argued that at the time of making the representations, the firm of engineers had no reasonable grounds for making them.[91]

In response, the firm of engineers argued that the claim was barred by reason of the limitation of liability clause in the contract between it and the developer. That limitation of liability clause read:

The maximum liability of the Consulting Engineer to the Client arising out of the performance or non–performance of the Services, whether under the law of contract, tort or otherwise, shall be the amount specified in Item 9 of the Schedule, or if no amount is specified, $300,000.00.

The clause also said the engineer would be discharged from liability 'whether under the law of contract, tort or otherwise' at the expiration of a period set out in the contract, and that the client would not be entitled to commence any action or claim whatsoever against the engineer.[92]

Justice McDougall, applying the approach to construction described by the High Court in *Darlington Futures Limited v Delco Australia Pty Limited*,[93] said that the interpretation of an exclusion clause is to be determined by giving the words in it their 'natural and ordinary meaning read in light of the contract as a whole'.

In the *Darlington* case, the High Court said that it was important to give due weight to the contractual context, including the nature and object of the contract as a whole, and that it might be necessary where appropriate to construe that clause contra preferentem in case of ambiguity.[94]

Justice McDougall examined the nature of the respective bargaining positions of the parties, finding that there was no suggestion that the contract between the developers and the engineers was negotiated 'other than on equal terms', and finding that each party was in a position to bargain for what they thought to be appropriate contractual protection.[95]

In the case of *Darlington*, one of the matters with which their Honours were concerned was whether application of the clause in question would have the effect of denying substantially to one party the entire benefit of the contract. Justice McDougall found that this was not such a case.

After a careful analysis of the wording of the clauses, McDougall J concluded that the engineering firm was making it clear that it does not give any warranty nor accept any liability, except as required by law or in the agreement. The court said it would be strange to conclude that the engineers had gone to considerable trouble to exclude some but not all sources of liability.[96] Looking to the intentions of the parties, the court stated it was apparent from the clause that the engineers and their lawyers were well aware of the potential impact of the TPA. The court found that:

To my mind, looking at the matter objectively, what the parties sought to achieve was to specify precisely and exclusively, so far as the law allows, the monetary and temporal limits of any liability that George Floth [the engineer] might have with the developers under the contract between them. To say that they did so in respect of all causes of action apart from those that might arise under the TPA is 'an artificial and non–commercial construction'. On the other hand, to construe it as the engineers submit seems to be 'looking at it objectively' no more than an effectuation of the intent of the parties.[97]

Ultimately the limitation of liability clause was upheld as valid and the engineers' cross–claim was successful. The court adopted the interpretation which best reflected the intent of the parties at the time of entering into the contract. Also interesting to note is the court's specific reference to the fact that the parties had presumably taken into account the effect of the statutory consumer framework in agreeing to limit liability under that scheme. Meaning, conceivably parties must show some sort of wider awareness of the statutory consumer framework as applying to their project.

TEMPORAL LIMITS ARE NOT CONTRACTING OUT

In *Lane Cove Council v Michael Davies Associated Pty Limited*,[98] Sackar J was asked to consider whether an architectural firm known as Michael Davies Associated (MDA) engaged in misleading and deceptive conduct in contravention of section 52 of the TPA by representing to the Lane Cove Council (Council) that the design and installation of the ceiling in the Lane Cove Aquatic Leisure Centre was adequate for the conditions that would be present in an indoor aquatic centre.

MDA had a retainer with Lane Cove Council which limited its liability to $300,000. Clause 17 of the retainer also stated that MDA's liability 'whether under [the] law of contract, in tort or otherwise' would cease once one year had expired following whichever was the earliest of a final invoice from MDA, the termination of MDA's services, or the date of practical completion.[99] The Council attempted to rely on the six–year limitation period in section 82 of the TPA which would allow claims against MDA. Justice Sackar disagreed, stating that 'the ordinary meaning of those words in clause 17 would include liability under a statute such as a claim for misleading and deceptive conduct'.[100]

Justice Sackar held that the relevant clauses do not amount to a contracting out of the TPA, and that the clauses simply reflect the parties' intentions to impose temporal and monetary limits on the damages that may be awarded under provisions such as section 82.[101] Justice Sackar said the contractual limitations sought to limit the quantum of any liability and the period of time within which a claim could be made 'under law of contract, in tort or otherwise'.

Whilst the claim for misleading and deceptive conduct had not been properly made out in this case,[102] his Honour made comments to the effect that such a claim would have been barred in any case for being out of time.[103]

PARTIES CAN EXTINGUISH THEIR OWN STATUTORY RIGHTS

Two cases have been brought before the New South Wales Supreme Court, on the issue of whether parties can agree to limit or extinguish their own statutory rights. In both cases, the court upheld a party's ability to do so. In 2012, Justice Sackar considered the validity of a limitation clause in respect of misleading and deceptive conduct.[104] In that case, HSBC and Firstmac entered into a sale deed, which contained a clause to the effect that:

- neither the Buyer nor Firstmac has a right to recover any amount under any Claim for or in connection with a breach of warranty;
- the liability of HSBC for any such claim is absolutely barred, unless within five years after the Completion Date, the Buyer or Firstmac gives to HSBC notice of the claim, the nature of the claim, the amount claimed, and how the amount is calculated; and
- legal proceedings for the claim have been properly issued and validly served upon HSBC within three months from the date on which the Buyer or Firstmac first gives notice of the claim.

Firstmac alleged that certain warranties made by HSBC constituted misleading and deceptive representations which were made in trade and commerce. It was alleged that the Buyer and Firstmac relied upon the representations in entering into the sale deed. Damages were claimed pursuant to section 82 of the TPA.

HSBC argued that the relevant clause meant that the Buyer and Firstmac had no right to recover any amount under any claim 'for or in connection with' a breach of warranty. By reason of that clause, it was argued that the defendant's liability for any such claim is absolutely barred unless the three conditions in the relevant clause were satisfied.[105]

HSBC argued that the requirement for legal proceedings to have been issued and validly served within three months had not been satisfied. As a result, Firstmac had no right to recover and their claims were 'absolutely barred'. On the other hand, Firstmac contended that the clause was ineffective to bar a claim pursuant to section 52 of the TPA, relying on the long established principle that a cause of action enlivened by contravention of the TPA cannot be modified or excluded by contractual provision.[106] Further, it was argued that the TPA claim should be seen as quite separate and distinct from the breach of warranty and should not appropriately be seen as a claim brought 'for or in connection with' a breach of warranty.[107] HSBC submitted a monetary or temporal limit can be imposed by contract on a statutory claim of this sort consistent with principle.[108]

Justice Sackar's reasoning was particularly interesting. In consideration of the validity of clauses such as the one HSBC sought to rely upon, his honour said this raised two issues: (1) the question of construction; and (2) the question of whether it was permissible to agree on temporal or monetary limits in the context of a statutory remedy.

In examining the black and white words of the clause, his honour considered the judgment in *Darlington Futures Limited v Delco Australia Pty Limited*[109] which said that an exclusion clause must be interpreted according to its natural and ordinary meaning and:

... read in light of the contract as a whole… giving due weight to the context in which the clause appears including the nature and object of the contract.[110]

In examining the nature of temporal limits, his honour considered the decision in *Port Jackson Stevedoring Pty Limited v Salmond & Spraggon (Aust) Pty Limited*,[111] which said that such limits were enforceable as per the words of the contract:

... unless their application… should lead to an absurdity or defeat the main object of the contract or, for some other reason, justify the cutting down of their scope.[112]

Justice Sackar went on to examine whether it was permissible for parties to extinguish their own statutory rights. His honour drew on the comments of Mason J in *Commonwealth of Australia v Verwayen*,[113] where it was remarked that 'some statutory rights are capable of being extinguished by the person for whose benefit they have been conferred'[114] and that it is necessary to characterise the legislation to determine 'whether the benefit conferred is personal or private, or whether it rests upon public policy or expediency'.[115] Justice Sackar agreed that if the contractual provision can be characterised as 'procedural rather than substantive in nature', this would suggest they can be waived.[116] Concluding, Sackar J agreed with the relevant authorities that the clause limiting the time for any claims to be made was valid on the basis that parties may extinguish or curtail statutory rights in their favour if those rights are procedural in character.[117] Further, Sackar J stated that:

I see nothing wrong in principle with parties fixing a shorter time period than that which may be provided by a relevant statute. I see nothing in particular in the TPA that would preclude parties from modifying the operation of section 82 of the TPA as it was.[118]

Sackar J also appeared to stress that there was a clear distinction between a contractual term purporting to wholly exclude a statutory remedy (such as damages) and one that seeks to limit that remedy (such as by placing a cap on damages or limiting the time for the making of claims).[119]

In 2015, the same issue was brought before the New South Wales Supreme Court. In the case of *Omega Air Inc v CAE Australia Pty Limited*,[120] CAE agreed to transport a Boeing 707 full flight simulator owned by Omega from the Richmond Air Base in New South Wales to Las Vegas. Omega had bought the simulator from the Commonwealth of Australia in October 2008.

The relevant clause in the contract read:

... no such dispute shall be submitted to arbitration as herein provided nor shall any action be brought by either Party against the other except within one year after the breach or alleged breach of the Agreement shall have occurred.[121]

Omega argued that CAE made representations that were misleading and deceptive in contravention of section 18 of the ACL and that it suffered loss as a consequence (it was alleged that CAE made express and implied representations concerning the nature and quality of the services it would provide in connection with the transportation of the simulator; it was also alleged that CAE made express and implied representations concerning the insurance it would obtain in connection with the transport of the simulator.

It was pleaded the representations were 'future matters' which section 4(1) of the ACL provides is misleading if there are no reasonable grounds for making it.

Justice Ball remarked that it was well accepted that parties cannot contract out of liability for misleading and deceptive conduct, but that 'if the parties can agree to limitations on those rights, it is not easy to see how the line can be drawn between those limitations that are acceptable and those that are not'.[122] Justice Ball noted that the issue had not been considered by the High Court or any immediate court of appeal.[123]

RETURN OF FREEDOM OF CONTRACT

It is the author's view that the abovementioned trial judge cases may indicate a new path in the court system—one which embraces freedom of contract and respects the will of the parties at the outset of construction contract negotiations. The judgments above appear to demonstrate a respect for the agreement reached between contracting parties, acknowledging the free will of reasonable business people operating in the construction industry to limit their own rights (and thereby creating certainty as to residual liability).

ANOTHER TIME BAR?

It is the author's view that parties may (in some circumstances) be able to argue that the imposition of temporal limits in respect of submitting and notifying the other party of claims is a time bar to be construed strictly. The nature of a time bar is to require one party to comply with a specific deadline in order to be entitled to relief.[124] By comparison, the nature of a temporal limit is to require a party to either notify the other party of its claim or commence proceedings within a certain period of time stipulated in the contract.

If the party fails to do so, it is barred from claiming relief. In the construction context, time bars are most (somewhat controversially) relevant to claims for extensions of time and variations. Parties have attempted to argue that such clauses are overly restrictive, unreasonable and penalising.[125]

That said, recently courts have upheld the validity of time bars in construction contracts notwithstanding the arguably onerous effect they have. The relevant case is *CMA Assets v John Holland*,[126] whereby a subcontract between John Holland and CMA Assets contained a clause to the effect that CMA was not entitled to any extension of time unless it notified John Holland in writing of the likelihood of delay, as soon as becoming aware of the likelihood of the delay and:

- taken all reasonable steps possible to preclude the occurrence of the cause of the delay;
- taken all reasonable steps possible to minimise the extent and consequences of the delay;
- notified John Holland, in writing, of the subcontractor's intention to apply for an extension of time, within seven days after the occurrence of the cause of any delay; specifying the cause of the delay, an estimate of the length of delay and the steps the subcontractor will take to keep the delay as minimal as possible; and
- each notice submitted by the subcontractor must within 14 days after the commencement of the delay, be given to John Holland by way of a written claim setting out all the facts upon which the claim is based and shall state the number of days' extension claimed; show and justify any effect on the approved construction program or any approved revision thereof, and identify the separable portion of portions or the whole of the works for which the claim was made.

CMA submitted written notices to John Holland pursuant to the provisions of the contract, however the notices did not comply with the time stipulated in the clauses. CMA accepted that the notices were not served in time but claimed that this should not matter as John Holland was entirely aware of the cause of the delay.[127] John Holland on the other hand argued that the notice provisions required CMA to provide prescribed information which was not given to them, and therefore they could validly reject the claims. The court found in favour of John Holland, and CMA was liable to pay $1,182,700 in liquidated damages to John Holland for delay in completion.

The CMA decision echoes earlier comments made by Justice Pagone that enforcement of strict notice and time bar provisions would encourage, if not compel, contractors:

... to be more concerned with anxiously satisfying a formal temporal requirement of notification rather than to explore the underlying needs and circumstances of the situation.[128]

Arguably the same reasoning may be applied to temporal limits. Temporal limits require a party to give notice of their claim and/or commence proceedings within the time stipulated under contract. On the basis of the *John Holland* case referred above, the author queries whether a party seeking to enforce a temporal limit on misleading and deceptive conduct claims, could rely on case law in respect of valid time bars to convince the court that such a clause should be given full force and interpreted strictly.

Of course, it must be acknowledged that time bars in relation to delay and variation claims can be distinguished from time bars in relation to misleading and deceptive conduct claims on the basis the underlying purpose behind each clause differs.

By way of further analysis, time bars relating to extensions of time are usually for the purpose of alerting the superintendent or the principal of circumstances to enable them to investigate further and decide whether to grant an extension.[129] The purpose of a time bar in relation to misleading and deceptive conduct claims is to place a limit on that party's exposure to lawsuits under a statutory framework, after the expiry of a prescribed period of time. Arguably, a party could seek to distinguish the different types of time bars in an effort to declare the latter clause invalid.

Ultimately, courts will look to the parties' intentions to 'determine the most reasonable interpretation, taking into account the factual background known to the parties at or before the date of the contract, including evidence of the genesis and objectively the aim of the transaction'.[130] Accordingly a court will look at whether the principal, in drafting the clause attempting to limit liability, intended the clause to cover claims for misleading and deceptive conduct under the ACL. If the court finds that the party did intend to limit liability for such claims, there is a possibility (on the basis of the court's inclination to interpret contract clauses narrowly) that the clause will be upheld. After all, such a clause is not intending to oust the jurisdiction of the court or stamp out statutory rights.

MONETARY CAPS—MURKY WATERS

Whilst case precedent is scarce, recent obiter dicta suggest that monetary caps on claims for misleading and deceptive conduct might be valid. In the case of *Sabic Petrochemicals Limited v Punj Lloyd Limited*,[131] the court considered the scope of a limitation clause in respect of a monetary cap on liability. Sabic was a manufacturer of petrochemical products.[132] In 2006, Sabic entered into a contract with Simon Carves Limited (SCL) whereby SCL agreed to design, procure and construct a low–density polyethylene plant. Punj Lloyd Limited (PLL) provided a Parental Company Guarantee in respect of SCL's performance of the contract.[133] SCL subsequently went into administration.[134]

By the end of 2006, it was apparent that the completion date would not be achieved so the parties entered into a 'compromise' agreement, which varied the original contract to the effect that the completion date was extended and the original contract price was increased.[135] Sabic agreed to make payment of the whole of the balance of the existing contract price in advance although it was not yet due.[136] SCL also agreed to provide an advance payment guarantee.[137] After further difficulties arose, in 2008 Sabic issued a letter to SCL purporting to terminate the contract.[138] Sabic commenced proceedings to call on the advance payment guarantee and the performance guarantee, and PLL/SCL disputed Sabic's entitlement to terminate the contract.[139]

There was a limitation of liability clause in the contract between Sabic and SCL to the effect that the aggregate liability of SCL:

… under or in connection with the contract (whether or not as a result of the contractor's negligence and whether in contract, tort or otherwise at law ... shall not exceed 20 per cent of the sum of the contract price plus or minus the value of any variations issued prior to the date of mechanical completion.[140]

The court held that the monetary cap of 20 per cent on SCL's liability:

... did not apply to SABIC's claim for recovering its costs to complete the project after it terminated SCL's employment, but only to SABIC's claims for breaches of contractual or tortious obligations.[141]

The effect of this case is that monetary caps might be upheld, where such clauses are adequately and precisely drafted. The implications of this case are yet to be considered in the context of imposing monetary caps on claims for misleading and deceptive conduct, however it may be of persuasive value in convincing a court that clauses imposing monetary caps should be interpreted strictly—providing the clause is sufficiently broad enough to cover misleading and deceptive conduct claims.[142]

UNFAIR CONTRACT TERMS

Arising out of the cases above, a key consideration for the courts has been whether the parties have been on equal footing in negotiating the terms of the contract. The author queries whether, in light of this, the Unfair Contract Terms may have implications for parties to construction contracts dealing with small businesses in negotiating the inclusion of limitation of liability clauses.

The *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015* (Cth) (Unfair Contract Terms) was enacted in November 2016.[143] The Unfair Contract Terms apply to small businesses with less than 20 employees where the contract price is less than $300,000, or if the contract is for more than 12 months and the contract price is less than $1M.[144] It applies to all standard form contracts entered into with small businesses.[145] The effect of Unfair Contract Terms on construction projects generally is that there is now a risk that certain terms will be deemed unlawful and severed from the contract with the enforcing party potentially liable for compensation.[146]

One of the factors that a court will consider in examining whether a particular clause in 'unfair' is whether it causes a significant imbalance in the parties' rights, whether it is not reasonably necessary in order to protect the legitimate interest of the party who would be benefitted by the term, and whether it would cause detriment to a party if it were relied upon.[147]

A court must take into account:

- whether one of the parties has all or most of the bargaining power relating to the transaction;[148]
- whether the contract was prepared by one party before any discussion relating to the transaction occurred between the parties;[149]
- whether another party was, in effect, required either to accept or reject the terms of the contract in the form in which they were presented;[150]
- whether another party was given an effective opportunity to negotiate the terms of the contract;[151]
- whether the terms of the contract take into account the specific characteristics of another party or the particular transaction;[152] and
- any other matter prescribed by the regulations.[153]

In construction, standard form contracts come in a range of different forms. Standard forms were first developed in the late nineteenth and twentieth centuries by industry and professional bodies first in the United Kingdom and then in Australia.[154]

As Sharkey et al observe:

These forms have evolved by a process whereby a consensus is forged among various industry interest groups and reflected in a standard form, that form becomes increasingly the subject of amendments, and then the interest groups sit down once again in an endeavour to document a revised common approach.[155]

It is conceivable that many of the standard form contracts imposed upon parties operating in the construction industry today would be subject to the provisions of the Unfair Contract Terms.[156] There is no exemption for industry developed standard form contracts such as those used in the construction industry, and whilst a court may take into account the fact that a standard form has been designed to 'strike a fair balance between competing interests',[157] a court is not bound to do so.[158]

To recap, in the case of *Owners SP 62930 v Kell & Rigby*,[159] the court placed a significant emphasis on the bargaining power of each party, and ultimately held that the contract between the respective parties was negotiated on equal terms.[160] The limitation of liability clause in question was upheld as valid on that basis. The court said that each party was in a position to bargain for what they thought to be the appropriate contractual protection. Arguably, the Unfair Contract Terms will only further enliven a court's inclination to examine the bargaining positions of each party. For those construction companies affected by the Unfair Contract Terms, it is the author's view that clauses purporting to limit liability for misleading and deceptive conduct claims will be declared invalid. The Unfair Contract Terms therefore present a very real risk to certain parties operating in the construction industry seeking to limit their liability for ACL claims.

RISK OF VOID CONTRACT

Above all else, and notwithstanding the recent spout of cases in support of parties limiting their liability for misleading and deceptive conduct, it must be acknowledged that there is a real risk that a court could declare a limitation of liability clause to be invalid. Depending on the particular drafting used, this may place the entire construction contract at risk. Until this is resolved by an appellate court or indeed by the legislature, it is the author's view that parties should ensure any attempts to limit liability under the ACL are able to be severed from the contract, and that the clauses are drafted in a 'cascading' manner.[161]

CONCLUSION

This paper has explored the impact of misleading and deceptive conduct claims in the construction industry, arguing that parties should be free to negotiate and agree to limitation of liability clauses in their construction contracts for claims under the ACL. This paper first discussed why this was an important issue confronting the construction industry, concluding that ACL claims amount to significant cost and uncertainty for parties in the construction industry. The paper then examined the application of classical contract theories, in support of the proposition that limitation of liability clauses ought to be valid in the context of freedom of contract. The paper explored some of the ways in which parties can make claims using the ACL to shift liability in relation to delay, scope, latent conditions, construction costs and payment onto the opposing party.

The paper then examined what it is meant by limitation of liability clauses in contracts, by way of explaining the various mechanisms that parties and their lawyers can utilise. It was found that some of the limitation of liability mechanisms (in particular temporal limits and monetary caps) have not been examined by an appellate court and they remain exposed to risk of challenge.

The paper went on to analyse recent trial judge cases which have upheld a party's ability to do limit its rights under the ACL, speculating that this may be the beginning of the re–emergence of classical contract law underpinnings emphasising freedom of contract. Finally, the paper examined the risks of relying on limitation of liability clauses in a time where the law remains unsettled, including some of the arguments that lawyers may attempt to run in relation to upholding the validity of those clauses.

Misleading and deceptive conduct claims in construction represent a significant, uncertain and often costly risk to industry participants. It is the author's view that parties should be able to control (not eliminate) the extent of their liability for claims under the ACL by way of negotiation on equal footing. As it presently stands, it remains open as to whether an appellate court (or indeed the legislature) will agree.

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CAUTION—MODERN SLAVERY ACT UNDER CONSTRUCTION!

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INTRODUCTION

The construction, real estate and development industries are about to come under renewed scrutiny in relation to their supply chain due diligence and labour practices.

On 16 August 2017, the Minister for Justice, Michael Keenan, announced that the Federal Government proposes to introduce legislation to require large businesses to report annually on their actions to address modern slavery. This announcement reinforces Australia's commitment to having one of the strongest responses to modern slavery in the world.

It is currently proposed that businesses with revenue of more than $100m will be required to report annually on their efforts to identify and stop modern slavery in their operations and supply chains.

Many Australian construction, real estate and development businesses may be unaware of the slavery risk in their business or supply chains. For these key risk industries, statistics reflect a low level of awareness of the modern slavery risk, both domestically and overseas.

Here, we outline what the reporting requirement is likely to involve and how Australian businesses in the sector can prepare. But first, we take a look at the statistics and some examples of keys risks in the sector.

DID YOU KNOW…

• in excess of 40 million people globally are subject to some form of modern slavery, the construction and real estate industry employs approximately seven per cent of the global workforce;

• the construction and real estate industries are some of the most vulnerable sectors to modern day slavery (caused by strict deadlines, high demand for low–skilled, manual, low–waged or

Many Australian construction, real estate and development businesses may be unaware of the slavery risk in their business or supply chains. For these key risk industries, statistics reflect a low level of awareness of the modern slavery risk, both domestically and overseas.

From an industry perspective, there is a high risk that businesses in the construction, real estate and development sectors have modern slavery in their operations or supply chains ... particularly where construction occurs in emerging economies. Those risks are in addition to the risks that all businesses face in sourcing products and services globally.

migrant workers on temporary visa and lack of education);

• in the Asia Pacific region alone the infrastructure market is expected to grow by seven–eight per cent a year over the next decade approaching $5.36 trillion annually by 2025, and along with it the US$150 billion per year generated from forced labour will likely grow too, if not addressed;

• growing economies through South East Asia have created a strong demand for infrastructure projects, building and construction materials and services, and in turn Australian development and construction business are increasingly leveraging their exposure to the Asian markets;

• many of the materials used in the construction industry are high risk for slavery in their manufacture, including bricks, timber and rubber produced with forced labour and/or child labour in India, China and Brazil;

• according to a 2016 study by Achilles Group, 39 per cent of construction businesses across the globe do not have a plan in place to find out who is in their supply chain.

WHAT IS MODERN SLAVERY?

At its broadest, the term 'modern slavery' incorporates any situation of exploitation where a person cannot refuse or leave work because of threats, violence, coercion, abuse of power or deception. It includes slavery, servitude, forced labour, debt bondage, and deceptive recruiting for labour or services.

The Australian Government proposes that for the purpose of the reporting requirement, modern slavery will be defined to incorporate conduct that would constitute a relevant offence under existing human trafficking, slavery and slavery–like offence provisions set out in divisions 270 and 271 of the Commonwealth Criminal Code. However, the exact scope of 'modern slavery' is still the subject of consultation and it remains unclear whether the definition of 'modern slavery' will go beyond the Criminal Code offences.

EXAMPLES OF MODERN SLAVERY

• employers withholding wages or forcing staff to work at rates lower than those previously agreed;

• labour agents confiscating the passports of migrant workers, often with little grasp of English, forcing them to work and live in squalid conditions;

• recruitment fees payable by employees from future wages; and

• workers operating within unsafe conditions or with inadequate personal protective equipment (PPE) resulting in significant injury or even fatality.

HOW WILL A MODERN SLAVERY ACT AFFECT YOUR BUSINESS?

Given bipartisan support for a Modern Slavery Act, Australia is likely to have a reporting requirement relating to modern slavery that could be in place as early as 2018. The likelihood is that the new Australian regime will be similar in many respects to the United Kingdom regime.

The current proposal would require businesses to address the following matters in their statements:

• the entity's structure, its operations and its supply chains;

• the modern slavery risks present in the entity's operations and supply chains;

• the entity's policies and process to address modern slavery in its operations and supply chains and their effectiveness (such as codes of conduct, supplier contract terms and training for staff); and

• the entity's due diligence processes relating to modern slavery in its operations and supply chains and their effectiveness.

The Joint Standing Committee on Foreign Affairs, Defence and Trade, which is responsible for the ongoing Inquiry into establishing a Modern Slavery Act in Australia, has given its in principle support for the Australian Government to publish a list of businesses obliged to report and a list of businesses that fail to report.

A publicly accessible central repository for published statements is also proposed.

Australian businesses ought to expect that there will be significant public criticism of those businesses that do not comply with their reporting obligations and that statements, once published, will be subject to intense public scrutiny, as has been the case in the United Kingdom.

The existence of a central repository of statements will facilitate the monitoring and review of statements. It is also likely to assist businesses, consumers and other stakeholders to understand the steps being taken by businesses to eradicate modern slavery in their operations and supply chains and take more effective steps to address the underlying issues.

WHAT'S YOUR RISK?

Every business caught by the regime will need to assess its modern slavery risks in order to prepare a statement. This will need to be an ongoing process and should incorporate an assessment of sector, jurisdictional and entity specific risks.

From an industry perspective, there is a high risk that businesses in the construction, real estate and development sectors have modern slavery in their operations or supply chains (see stats above), particularly where construction occurs in emerging economies. Those risks are in addition to the risks that all businesses face in sourcing products and services globally.

INDUSTRY SPECIFIC RISKS

• engagement of third party contractors, subcontractors and consultants without express obligations concerning ethical recruitment and retention of labourers, and transparent supply chains;

• engagement of labour and working conditions in emerging economies, including forced labour, debt bondage and little (or no) remuneration; and

• procurement of construction machinery and parts, bricks, rubber, timber, iron, copper aluminium, tin, nickel, including risks involved in shipping.

WHAT SHOULD YOU DO?

If they have not already done so, larger businesses operating in the construction, real estate and development industries should consider taking the following steps:

(1) mapping the organisation's structure, businesses and supply chains;

(2) formulating policies in relation to modern slavery—this will involve collating current policies, identifying gaps, adapting existing policies and formulating new policies, as needed;

(3) carrying out a risk assessment—identifying those parts of the business operations and supply chains where there is a risk of modern slavery taking place;

(4) assessing and managing identified risks—this may include carrying out further due diligence in the entity's operations and supply chains and reviewing and adapting contract terms and codes of conduct with suppliers;

(5) considering and establishing processes and KPIs to monitor the effectiveness of the steps taken to ensure that modern slavery is not taking place in the business or supply chains;

(6) carrying out remedial steps where modern slavery is identified; and

(7) developing training for staff on modern slavery risks and impacts.

Additionally, Australian construction, real estate and development businesses should bear in mind that apart from the introduction of new government regulation, there are many other good reasons for taking these steps, particularly at a time when businesses are facing renewed public pressure to operate sustainably and ethically.

By undertaking these steps, businesses will be well placed to respond effectively to new regulations and show that they are committed to eradicating modern slavery, in Australia and overseas, and taking concrete steps to achieve that objective.

Abigail McGregor, Jehan–Philippe (JP) Wood and Greg Vickery's article was previously published on the Norton Rose Fulbright web site—September 2017. Published with permission.
Note: Norton Rose Fulbright made a submission to the Inquiry (No 72) and participated in the public hearing held in Sydney on 23 June 2017.

TECHNOLOGY ASSISTED REVIEW

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TAR IN AUSTRALIA

The Federal Court of Australia now recognises the use of Technology Assisted Review (TAR) in electronic discovery, in its updated practice note Federal Court of Australia Technology and the Court Practice Note (GPN–TECH). Similarly, the Supreme Court of Victoria has released a new practice note, also recognising the use of TAR: Supreme Court of Victoria, Practice Note SC Gen 5 Technology in Civil Litigation.

While many Australian law firms have been using this technology to assist in review of electronic documents for discovery for some years, and other jurisdictions have been using TAR, endorsed by the courts, it is only recently that Australian courts have accepted the use of TAR.

In the Federal Court of Australia on 7 November 2016, Murphy J made orders in *Money Max Int Pty Ltd v QBE Insurance Group Ltd*[1] that the applicant provide a report from its e.discovery provider:

... describing with particularity the manner in which the respondent has applied technology assisted review (TAR) for the purposes of giving discovery.

In particular, the report was to set out the:[2]

- nature and technical parameters of the TAR algorithm used;
- process for selecting and coding the training set of documents;
- process for selecting and coding the validation set of documents;
- process for training the algorithm to identify relevant documents for production, including the level of relevance applied;
- process for validation and testing, including disclosure of analyses relating to the accuracy, validation or quality of documents produced;
- number of documents in the complete data set identified as relevant and irrelevant following the application of TAR and, with respect to the relevant documents, the number of documents withheld on the basis of privilege;
- search terms applied in conjunction with TAR; and
- process followed with respect to potentially privileged documents.

In *McConnell Dowell Constructors (Aust) Pty Ltd v Santam Ltd & Ors*,[3] Vickery J made orders that the use of TAR, stating that such orders fell within the overarching purpose of *Civil Procedure Act 2010* (Vic) section 7.

Vickery J noted that TAR has been recognised and 'endorsed' in other jurisdictions[4] and referred to the case of *Pyrrho Investments Limited v MWB Property Limited*,[5] where the High Court of the United Kingdom set out how the TAR process works. In that case, Master Matthews stated that predictive coding is just as accurate, if not more so than a manual review using keyword searches, and also estimated that predictive coding would offer significant cost savings in this particular case and that the possible disclosure of over two million documents done via traditional manual review would be disproportionate and 'unreasonable'.

His Honour also referred to the case of *Irish Bank Resolution Corporation Ltd & Ors v Quinn & Ors*[6] and quoted the following excerpts from that judgment:[7]

66. The evidence establishes, that in discovery of large data sets, technology assisted review using predictive coding is at least as accurate as, and, probably more accurate than, the manual or linear method in identifying relevant documents. Furthermore, the plaintiff's expert, Mr. Crowley exhibits a number of studies which

have examined the effectiveness of a purely manual review of documents compared to using TAR and predictive coding. One such study, by Grossman and Cormack, highlighted that manual review results in less relevant documents being identified. The level of recall in this study was found to range between 20 per cent and 83 per cent. A further study, as part of the 2009 Text Retrieval Conference, found the average recall and precision to be 59.3 per cent and 31.7 per cent respectively using manual review, compared to 76.7 per cent and 84.7 per cent when using TAR. What is clear, and accepted by Mr. Crowley, is that no method of identification is guaranteed to return all relevant documents.

67. If one were to assume that TAR will only be equally as effective, but no more effective, than a manual review, the fact remains that using TAR will still allow for a more expeditious and economical discovery process …

69. Pursuant to the legal authorities which I have cited supra, and with particular reference to the albeit limited Irish jurisprudence on the topic, I am satisfied that, provided the process has sufficient transparency, Technology Assisted Review using predictive coding discharges a party's discovery obligations under Order 31, rule.12.

Vickery J made reference to 'TEC SOP 5 [TAR]' which was to be an interim measure and apply for use in the TEC List pending Practice Note SC Gen 5 Technology in Civil Litigation.

TAR—WHAT IS IT?

TAR is being lauded as a way to locate relevant documents for discovery, and of course it is only relevant documents that can be admitted as evidence. TAR helps lawyers find relevant documents in a much more efficient and cost effective manner compared to traditional linear review which often meant relying on junior lawyers who may not have fully understood the case, and who were faced with a long and tedious process of reviewing hundreds of documents during an eight (or more) hour shift.

Technology on the other hand, is not subject to fatigue, hangovers, gossip or being ill–informed. These tools use every word in every document to assign relevance as determined by the senior lawyer on the matter.

TAR is burgeoning artificial intelligence, which can include a number of different 'clever' technologies, and research is ongoing in order to find even more clever ways of finding what lawyers seek in a repository of documents. These technologies include 'clustering', 'concept searching', 'email threading', 'near de–duplication' and 'predictive coding'. In–built features, such as predictive coding are being celebrated as the answer to help curtail ever–increasing litigation costs for both in–house and external counsel.

CLUSTERING TECHNOLOGY

Clustering technology can be used to group together emails and other electronic documents that relate to the same topic. Clustering relies on statistical relationships which result in documents with similar words being clustered together. The clustering software compares each document in a set to a 'pivot' document which has already identified as relevant. The more words a document has in common with the pivot document, the more likely it is to be about the same topic and therefore relevant. The clustering software ranks documents based on their statistical similarity to the pivot document.

... technologies include 'clustering', 'concept searching', 'email threading', 'near de–duplication' and 'predictive coding'. In–built features, such as predictive coding are being celebrated as the answer to help curtail ever–increasing litigation costs ...

Clustering can be used as a helpful tool for initial categorisation. The algorithms in the software analyse the actual content of individual documents—allowing them to be sorted into related 'clusters' or groups. The solution scans the content of each document and, by cross–referencing against a specialised index, identifies recurring key concepts. Documents dealing with discrete concepts can then be batched to individual reviewers, again so documents of a similar concept can be reviewed together.[8]

CONCEPT SEARCHING

Concept searching allows the technology to determine relevance by associating words with particular concepts. For example, if the term 'Java' is being searched, then the concept search engine would be able to identify whether it is 'Java' the Indonesian island, 'Java' the scripting language or 'Java' coffee beans are more relevant to the user. The concept search engine will still locate the other concepts, but will order them lower in relevance ranking than the relevant concepts.

When using a tool such as 'concept searching' a reviewer's workflow can be set so that the reviewer can review documents that may be associated with a particular issue or concept, so that they are reviewing documents that are similar in nature. In a traditional linear review, two different reviewers may review documents that are of similar concept, but this correlation may be missed because the two documents are reviewed in context with each other.

By utilising the power of the technology, the efficiency of the review increases enormously. Each reviewer would then see all of the documents related to a particular concept and this approach gives the reviewer additional context and enables him or her to quickly move through each conceptual batch, coding with more accuracy and consistency. By the time he or she finishes a particular batch, a reviewer should be an 'expert' on whatever concept was grouped into that batch.

Through conceptual batching there are advantages to be made where teams can structure the review to better meet the team's priorities. While the conceptual groups are generally software–created, once generated, a quick check of each cluster allows the case team to select those that are most relevant or most interesting for priority review. Likewise, conceptual clusters that are clearly irrelevant can be de–prioritised or bulk–tagged as such.[9]

EMAIL THREADING

'Email threading'[10] is another example of where technology assisted review really increases productivity. Email threading allows the reviewer to simply review the email that is last in the email thread; that email will include the whole conversation and the reviewer can determine if the whole thread is relevant or not. Therefore, instead of reviewing a number of related documents, or again seeing the documents out of context with one another, one document is reviewed to determine the relevance of many documents that are related. In a traditional review, no single reviewer is likely to see the entire thread and therefore misses out on the whole conversation.

NEAR DE–DUPLICATION

Near de–duplication allows documents that are similar, but not identical, to be identified and grouped together, based on a certain percentage similarly, which is set by the user when conducting the near de–duplicate search.[11] A pivot document is selected against which similar documents are compared, and then highlighted to the user. Differences between each similar document as compared to the pivot document are marked up so that the user can review these to determine if such documents are indeed duplicates for the purposes of the review, or for example, a different version of the pivot document. The differences are highlighted in much the same way that differences are highlighted using the 'compare' function in MS Word.

PREDICTIVE CODING

Predictive coding is a method where the user can 'train' the system to recognise documents that are relevant. A senior lawyer will be presented with a random set of, say, 500 documents from the repository which the lawyer will then mark as 'relevant' or 'not relevant'. The technology will then determine, from the words in each of the relevant documents, what other documents are relevant. The lawyer can review further randomly presented sets of documents, until the system learns what is relevant.

There are two primary terms in predictive coding; precision and recall.

Precision is the percentage of documents that lawyers review that are actually relevant. It is a measure of how efficient the reviewers are, and how much time is wasted reviewing non–relevant documents. The higher the precision rate percentage, arguably the more efficient and cost effective the review.

Recall is an illustration of how many documents are being missed and are not reviewed at all. In a perfect world with a reviewer who never makes a mistake, he or she would review every document in the document repository and would have 100 per cent recall. The lower the recall rate the more relevant documents are missing.

To compare the effectiveness of predictive coding with other review methods such as traditional linear (or manual) review or keyword searching or predictive coding, the results can be measured by the levels of precision and recall.

Judge Cote in the New York District Court has confirmed that: ... predictive coding had a better track record in the production of responsive documents than human review.[12]

Her Honour went on to say that although both predictive coding and human review fell short of identifying for production all of the documents the parties in litigation might wish to see, 'no one should expect perfection for this process'.[13]

Her Honour made the point that parties in litigation are required to act in good faith during discovery and that production of documents can be a herculean undertaking often requiring clients to pay vast sums of money. All that can be expected, said her Honour, was that :

... good faith, diligent commitment to produce all responsive documents uncovered when following the protocols to which the parties have agreed, or which a court has ordered.

The point of this case is to highlight that the use of technology such as predictive coding is becoming an accepted method of review during discovery and that indeed, can be more accurate than human review. The court made reference to an article published by Grossman and Cormack in *Technology–Assisted Review in E–Discovery Can Be More Effective and More Efficient Than Exhaustive Manual Review*,[14] where the authors compared the results of a review by humans against a review done using predictive coding; the results showed that predictive coding was more accurate and efficient.

DECISIONS IN UNITED STATES OF AMERICA

In the United States of America, in the case of *Da Silva Moore v Publicis Groupe*,[15] Magistrate Andrew J Peck, issued the first decision in a court in the United States of America, specifically addressing the use of predictive coding as a replacement for traditional linear document review. During argument, the plaintiffs expressed concerns about the accuracy of the original coding and the possibility that the software would overlook relevant documents.

Judge Peck stated that while many lawyers have embraced the technology, several are reluctant to because of the risk of legal sanction. With the order, Judge Peck has now removed that risk. As the court noted:

... statistics clearly show that computerized searches are at least as accurate, if not more so, than manual review.[16]

Citing a recent study, Judge Peck claimed that technology–assisted review is more accurate and fifty times more economical than exhaustive manual review. The ruling concluded with Judge Peck reasoning that:

... the use of predictive coding was appropriate considering…the superiority of computer–assisted review to the available alternatives (i.e. linear manual review or keyword searches).[17]

Judge Peck's decision exemplifies the changing nature of discovery for lawyers. In his ruling, Judge Peck stated his long held position the legal industry needs to embrace predicative coding and other technological processes as they continue to play an increasingly useful and relevant role in the justice system.

Addressing lawyers, Judge Peck stated:

What the bar should take away from this opinion is that computer–assisted review is an available tool and should be seriously considered for use in large–data–volume cases where it may save the producing party (or both parties) significant amounts of legal fees in document review.[18]

In the subsequent case of *Rio Tinto PLC v Vale SA*,[19] Judge Peck, after providing a brief history of cases where courts have allowed technology assisted review (TAR) where the parties agreed, Judge Peck stated that:

... it is now black letter law that where the producing party wants to utilize TAR for document review, courts will permit it.[20]

Judge Peck noted that though the extent to which adverse parties must cooperate in sharing TAR training documents is unsettled, the parties may choose to cooperate, as they did in this case, and should be encouraged to do so.

Finally, Judge Peck stressed that:

... it is inappropriate to hold TAR to a higher standard than keywords or manual review. Doing so discourages parties from using TAR for fear of spending more in motion practice than the savings from using TAR for review.[21]

With predictive coding, instead of using keywords to find documents, entire documents are indexed and the system is 'taught' which documents are relevant and which are not relevant, by having a lawyer review a random set of documents, and the system then uses algorithms to 'learn' what is relevant from the relevant documents selected. The system then finds documents that are conceptually similar to the relevant documents. Through rounds of teaching the system, say 1,000 documents at a time, the system is able to keep increasing the recall

... it is vital that relevant documents are located, and also any documents to which privilege applies so that these are not inadvertently discovered.

percentage until the high standard established by Judge Peck is achieved. Although the algorithms are advanced and not transparent to a lay user, the concept is not totally foreign, as anyone using a Google search has experienced advanced algorithms finding the webpages they intend (not simply which words appear in the websites).

In a typical review undertaken by paralegals, a document set of 35,000 documents might achieve a recall rate of about 50 per cent, in other words, half of the relevant documents may be missed.

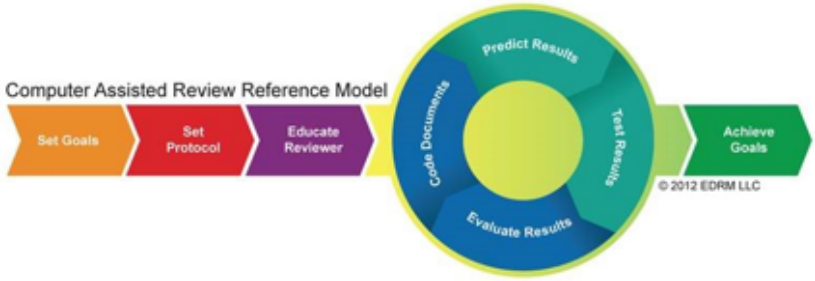
By contrast, if a Senior Associate reviews 4,500 utilising the random review process set out above, she might also achieve a recall rate of 50 per cent.

However, if the Senior Associate reviews 10,000 documents, the recall rate can be increased to 80 per cent, which is the standard that Judge Peck advocates.

STANDARDS

The EDRM now includes a standard for Technology Assisted Review (which the EDRM names 'computer assisted review').[22]

Figure 1: Computer Assisted Review Reference Model



ACADEMIC STUDIES OF TAR

Cormack and Grossman recently conducted a review of the best way in which the use of TAR should be conducted. The study looked at three types of TAR tools: Continuous Active Learning (CAL), Simple Active Learning (SAL) and Simple Passive Learning (SPL).[23] Essentially, all three use TAR to assist in 'training' the system to find relevant documents based on which documents the legal team code as 'relevant'.

Each method uses a process whereby a set of documents (training set), say 1,000 documents, is coded by a senior lawyer as 'relevant' or 'not relevant' which the system then uses to 'learn' which other documents might be relevant as well.

This process is repeated several times until the review team is satisfied that a sufficient level of relevant documents have been found. The difference between the three processes is whether randomly selected documents are used, or whether the set of documents has been located via a non–random method such as using basic keyword searching.

In the CAL method, the 1,000 documents are selected using keyword searches and then the documents that are coded by the lawyer are used to train a learning algorithm, which scores each document in the collection by the likelihood of it being relevant.

In SAL, the set of documents can be selected randomly or non–randomly, but then subsequent document sets for coding by the

reviewer are selected based on those about which the learning algorithm is least certain.

With SPL, the document set is selected randomly and relies on the review team to work on an iterative basis until there is some certainty that the review set is 'adequate'.

The study concluded that when keyword searches are used to select all of the training sets, the result was superior to that achieved when a random selection is used, and summed up that:

... random training tends to be biased in favour of commonly occurring types of relevant documents, at the expense of rare types. Non–random training can counter this bias by uncovering relevant examples of rare types of documents that would be unlikely to appear in a random sample.

Such studies are extremely valuable in learning how best to use this technology, however, further guidelines and endorsement from the courts would be welcome.

CONCLUSION

These search technologies are crucial in assisting lawyers to find electronic evidence that is relevant, since any documents that are not relevant will not be admissible. Further, it is only relevant documents that must be authenticated and which would be subject to any of the exclusionary rules of evidence. Therefore, it is vital that relevant documents are located, and also any documents to which privilege applies so that these are not inadvertently discovered.

However, the key to lawyers taking up the use of such technology, is through education, both at an undergraduate level, and for practitioners.

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9. See further: EDRM Website on Search Methodologies: <http://www.edrm.net/resources/guides/edrm–search–guide/search–methodologies> at 11 January 2017.

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FAILURE TO DIY—DETERMINATION SET ASIDE AS ADJUDICATOR RELIES ON THIRD–PARTY ASSISTANCE

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IN BRIEF

Judgment raises considerations for adjudicators

INTRODUCTION

In *St Hilliers Property Pty Limited v ACT Projects Pty Ltd & Anor* [2017] ACTSC 177, the Australian Capital Territory Supreme Court considered the extent to which an adjudicator appointed under the *Building and Construction Industry (Security of Payment) Act 2009 (ACT)* (the Act) may receive assistance in deciding an adjudication application.

The court found that the role of adjudicator is personal to the person who accepts their appointment and that a determination will be void if the adjudicator impermissibly delegates their function.

DID ADJUDICATOR FAIL TO FULFIL FUNCTION UNDER THE *SECURITY OF PAYMENT ACT*?

St Hilliers commenced proceedings seeking to set aside an adjudication application. During the proceedings, the adjudicator put an invoice into evidence that detailed the work performed on the determination. On review, the invoice revealed that half of the total hours spent on the determination was attributed to someone else.

In light of the invoice, the plaintiff argued that the determination was void on the basis that the adjudicator had impermissibly delegated his function, and in the process, considered material that was not open to him to consider under section 24(2) of the Act.

Section 24(2) of the Act expressly defines what an adjudicator is permitted to consider when deciding an adjudication application, as follows:

(2) In deciding an adjudication application, the adjudicator must only consider the following:

(a) this Act;

(b) the construction contract to which the application relates;

(c) the payment claim to which the application relates, together with any submission, including relevant documentation, properly made by the claimant in support of the claim;

(d) the adjudication application;

(e) the payment schedule, if any, to which the application relates, together with any submission, including relevant documentation, properly made by the respondent in support of the schedule;

(f) the adjudication response, if any;

(g) the result of any inspection by the adjudicator of any matter related to the claim.

In essence it was submitted that by liaising with a third party and considering draft determinations prepared by someone else (which contained many expressions of view and draft findings about legal and factual matters), the adjudicator failed to fulfil his function under the Act, ultimately requiring the determination to be set aside.

In addition to this, the plaintiff submitted that this delegation was a denial of procedural fairness as had the parties known that the adjudicator would ask someone else to draft his determination, they should have been given the opportunity to make submissions to that person.

In reply to this, the adjudicator submitted that whilst he had obtained help from a third party, this assistance was permitted under the Act. Further, and more importantly, the adjudicator submitted that he had personally applied his mind to, and had thoroughly considered, every issue raised, with the final product being his own.

COURTS FINDS ADJUDICATOR DID NOT COMPLY WITH SECTION 24(2) OF ACT, RAISES QUESTION ON DEGREE OF ACCEPTABLE ASSISTANCE

In determining whether the adjudicator had fulfilled his function under the Act, his Honour referred to McDougall J's comments in *Laing O'Rourke v H and M* [2010] NSWSC 818 at [39]:

In my view, the obligation to consider matters imposed by [the equivalent section in the NSW legislation to section 24(2)] should ... [require] an active process of intellectual engagement…

In consideration of the evidence before him, his Honour found that the adjudicator took into account a determination prepared by a third party, without active engagement, amounting to a failure to comply with section 24(2) of the Act.

The court accepted that an adjudicator is personally appointed under the Act to determine the application. This does not mean that an adjudicator must work alone, with no clerical or other assistance. It was held (at [118]) that, whether the assistance amounts to an usurpation of the task of adjudication must be a matter of degree.

The case leaves the question of where acceptable assistance ends and impermissible usurpation of the task of an adjudicator begins open. The assistance provided in this case was significant. Based on the timesheets alone, it appears that the third party contributed 50 per cent to the preparation of the adjudication determination.

CONSIDERATIONS FOR ADJUDICATORS AND PARTIES SEEKING TO SET ASIDE ADJUDICATION DETERMINATIONS

There are a number of key things to consider from this decision.

Firstly, adjudicators should carefully consider whether they are able to complete the determination within the statutory time. If they cannot, they should decline their appointment or seek additional time to ensure that the Act's requirements are complied with.

Secondly, it raises the issue of whether this was an isolated incident or a commonplace practice amongst adjudicators.

Thirdly, for a party who is dissatisfied with an adjudication determination, the decision provides a further ground to challenge and set aside adjudication determinations. A review of the adjudicator's invoice is the starting point. However, if the adjudicator does not indicate who actually undertook the work and provides only the hours, that will be difficult.

Finally, and more broadly, this decision exposes the shortcomings of the security of payment regime when attempting to determine lengthy and complex applications. As made plain by the legislation, the Act was originally intended for the protection of cash flow for small subcontractors. Large and complex adjudication applications place adjudicators in a difficult position, as they have to complete their task within a limited period of time, are required to engage with the task of valuing the work and are unable to seek assistance (beyond mere clerical or administrative assistance).

Timothy Seton and Isabella Johnston's article was previously published on the Colin Biggers & Paisley web site—September 2017. Published with permission. Declaration of interest: Colin Biggers & Paisley acted for the plaintiff in the case discussed in this article.

CONFIDENT IN INTERNATIONAL ARBITRATION'S CONFIDENTIALITY?

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INTRODUCTION

In the 1990s, one of the leading treatises on international arbitration noted that '[o]ne of the fundamental principles—and one of the major advantages—of international arbitration is that it is confidential.' This is no less true today. Confidentiality remains a key benefit of arbitration, and it is often cited as one of the most significant reasons parties choose to arbitrate instead of litigate.

At the same time, however, the scope of confidentiality in international arbitration can vary from one jurisdiction to another and from one stage of the arbitral process to another. Moreover, the relevance of confidentiality is today broadly discussed in the international arbitration community. Indeed, two leading practitioners have recently argued that the implied duty of confidentiality under the law of England and Wales should be brought to an end. While they do not depict the confidentiality of the arbitral process as something that is necessarily negative, they maintain that, rather than being a presumption, confidentiality should be a choice for the parties.

In view of this evolving legal landscape, this article provides an overview of confidentiality in international arbitration and highlights some circumstances in which aspects of the arbitral proceedings or the award itself may become exposed.

CONFIDENTIALITY IN THE UNITED ARAB EMIRATES AND THE BROADER GULF REGION

In United Arab Emirates, domestic law provides no general duty of confidentiality. Nevertheless, in Case No 157/2009, the Dubai Court of Cassation held as a general principle that arbitration is a private process to be conducted in secret unless the parties agree otherwise.

The procedural rules of arbitral institutions in the United Arab Emirates reinforce this notion. The Dubai International Arbitration Centre (DIAC) provides for the confidentiality of arbitration proceedings 'save and to the extent that disclosure may be required of a party by legal duty, to protect or pursue a legal right or to enforce or challenge an award'. Similarly, the Abu Dhabi Commercial Conciliation and Arbitration Centre (ADCCAC) has rules on the confidentiality of awards (Article 28) and hearings (Article 33).

Confidentiality in the United Arab Emirates's so–called 'offshore' jurisdictions is even more robust. In the Dubai International Financial Centre (DIFC), Article 14 of the DIFC Arbitration Law, DIFC Law No 1 of 2008, provides that:'[u] nless otherwise agreed by the parties, all information relating to the arbitral proceedings shall be kept confidential, except where disclosure is required by an order of the DIFC Court.

This standard is reflected in Article 30 of the rules of the DIFC–LCIA Arbitration Centre, which provide that 'the parties undertake as a general principle to keep confidential all awards in the arbitration, together with all materials … and all other documents produced,' while Article 19(4) of the DIFC–LCIA rules provide that 'all hearings shall be held in private, unless the parties agree otherwise in writing'.

The Arbitration Regulations of the Abu Dhabi Global Market (ADGM) likewise take a robust approach to confidentiality. Section 40 of the ADGM Arbitration Regulations states that 'unless otherwise agreed by the parties, no party may publish, disclose or communicate any confidential information [defined as 'any information relating to: (a) the arbitral proceedings under the

arbitration agreement; or (b) an award made in those arbitral proceedings'] to any third party' and then provides a list of limited exceptions (e.g., pursuing a legal right or having a legal obligation to disclose the information to a governmental or regulatory body, court, or tribunal), which could lead to the publicity of some information related to the arbitration.

The situation in the Gulf Region more broadly is not dissimilar, though national arbitration laws tend to be silent on the matter of confidentiality.

In Bahrain, Arbitration Law No 9 of 2015, like the UNCITRAL Model Law that it mirrors, is silent on the question of confidentiality. However, Article 20(4) of the rules of the Bahrain Chamber for Dispute Resolution (BCDR–AAA) states that '[h]earings are private unless the parties agree otherwise or the law provides to the contrary'.

Like the Bahraini law, the new Qatar arbitration law is silent on confidentiality. Under Article 41 of the rules of the Qatar International Centre for Conciliation and Arbitration (QICCA), however, every step of the arbitration is described as confidential and no publication is made without the prior written consent of all parties.

Article 43.2 of the Saudi arbitration law provides that the arbitral award shall remain confidential unless the parties agree otherwise, but the law does not have a provision relating to the confidentiality of the proceedings. The Saudi Centre for Commercial Arbitration (SCCA) covers both of these bases through its rules. Article 38 of the SCCA's arbitration rules provides that '[c]onfidential information disclosed during the arbitration by the parties or by witnesses shall not be divulged by an arbitrator, nor by the administrator' and goes on to state that '[e]xcept as provided in Article 22 [relating to privilege], unless otherwise agreed by the parties or required by applicable law, the members of the tribunal and the administrator shall keep confidential all matters relating to the arbitration or the award.'

CONFIDENTIALITY IN INTERNATIONAL ARBITRATION BEYOND THE GULF REGION

Broadly speaking, confidentiality is also recognized in arbitral proceedings in most of the prevailing international arbitration jurisdictions, although there are some differences in the contours of the confidentiality provided. Many countries provide for a duty of confidentiality either implicitly (e.g. England and Singapore) or explicitly (e.g. Switzerland and Hong Kong). Other countries, such as the United States and Australia, are more reluctant to edict a principle referring to arbitration as a confidential method of dispute resolution, leaving it to the parties or the courts to decide. Sweden, where arbitration is public unless the parties agree otherwise, sits at the far end of the spectrum.

Some countries lack precision on the matter. For example, France clearly provides for a duty of confidentiality in domestic arbitration, but whether such provision applies to international arbitration is still unclear and debated amongst French practitioners.

The procedural rules of most of the key international arbitral institutions also generally refer to arbitration as being confidential unless the parties agree otherwise. The London Court of International Arbitration (LCIA), International Centre for Dispute Resolution (ICDR), Singapore International Arbitration Centre (SIAC), and Hong Kong International Arbitration Centre (HKIAC) all provide a mandatory duty of confidentiality unless otherwise agreed by the parties.

Article 28(3) of the UNCITRAL Arbitration Rules provides for confidentiality of hearings 'unless the parties agree otherwise,' and Article 34(5) states that 'an award may be made public with the consent of all parties.' The use of 'may be' instead of 'must be' has not gone unnoticed and invites for flexibility.

Although the arbitration rules of the International Chamber of Commerce (ICC) do not expressly provide for a duty of confidentiality, Article 22(3) states that '[u]pon the request of any party, the arbitral tribunal may make orders concerning the confidentiality of the arbitration proceedings … and may take measures for protecting trade secrets and confidential information.'

CHALLENGES TO THE PRESERVATION OF CONFIDENTIALITY IN INTERNATIONAL ARBITRAL PROCEEDINGS

While the confidentiality of arbitration is usually well preserved, especially if parties consider it as sine qua non, there are times when confidentiality might be endangered.

The difficulty of approaching the concept of confidentiality in arbitration not only results from the multiplicity of actors involved who might not be bound by the arbitration rules (e.g. witnesses and translators) or the multiplicity of rules dealing with confidentiality in different ways but also because arbitration runs through different stages that might not all fall under the scope of an applicable rule on confidentiality. For example, as noted above, some laws or rules explicitly provide for confidentiality of the award but remain silent on the matter of the confidentiality of the proceedings.

The preservation of confidentiality can be a particularly acute challenge during the enforcement stage. Enforcement of an arbitral award in a foreign country requires recourse to a state court, and the treatment of confidentiality is not uniform at this stage of the process across jurisdictions.

In the United Arab Emirates, enforcement of arbitral awards is treated like a regular litigation. If a party seeks enforcement of an arbitral award, it has to present its claim to the court of first instance where the award–debtor has assets. The enforcement process remains confidential, meaning that judges are not allowed to disclose the award they have been provided. Nevertheless, they sometimes provide information on the case in their final decision that makes references to the award, names and arguments of the parties, and the amount awarded. Since this final decision is publicly accessible, the confidentiality of the award may not always be fully preserved.

With respect to the DIFC, the DIFC Courts issued a Practice Direction supporting for the confidentiality of arbitration–related proceedings in 2013 (Practice Direction 2/2013). Pursuant to DIFC Court Rule 43.41 and Practice Direction 2/2013, all arbitration–related proceedings are to be held in closed court unless one of the parties applies for the matter to be held in open court or the court 'is satisfied that those proceedings ought to be heard in open court'. Practice Direction 2/2013 also provides that a court 'must not make a direction permitting information to be published [in such a closed–court proceeding] unless—(a) all parties agree that the information may be published; or (b) the court is satisfied that the information, if published, would not reveal any matter (including the identity of any party) that any party reasonably wishes to remain confidential'.

Section 30 of the ADGM Arbitration Regulations has substantively identical provisions, though it provides for closed–court proceedings unless the parties agree that the matter should be heard in open court or the court concludes that the proceedings should be held in open court.

Coupled with the rules of an arbitral institution that provides for a high degree of confidentiality, these DIFC and ADGM provisions provide for the possibility of nearly airtight private arbitral proceedings.

In some jurisdictions, however, the arbitral award becomes part of the public record with few limitations during the enforcement stage. In the United States, for example, when a party seeks enforcement of an arbitral award, a copy of the award must be provided to the court, and the ensuing litigation is, most of the time, conducted in public proceedings. In *Mead Johnson & Co v Lexington Ins Co*, the court concluded that '[o]nce a confidential settlement agreement or arbitration decision becomes the subject of litigation, it must be opened to the public just like any other information'. Such rules may result in the confidentiality of the arbitration process not being preserved.

Another consideration that enters into the equation is exactly how one enforces a confidentiality obligation or the appropriate redress once confidentiality is breached. In terms of enforcing confidentiality, a party may apply to the arbitral tribunal for an order prior to the issuance of an award, though ultimately the tribunal may have difficulty enforcing its order other than through imposing costs on the breaching party. Therefore, the best scenario may involve seeking an injunction through the local courts in the jurisdiction where the disclosure is likely to be made, meaning that, once again, the applicable rules may vary depending on the jurisdiction.

CONCLUSION

While international arbitration is not confidential by nature, arbitral proceedings and awards are still frequently considered confidential in practice. However, not all national arbitration laws and institutional rules have incorporated confidentiality provisions. As a result, the degree of confidentiality can vary from one jurisdiction to another, and confidentiality might be jeopardized in the event that a party seeks the enforcement of an arbitral award in another country.

However, arbitration is a consensual method of dispute resolution where the parties' convenience is at the heart of the process. The solution is for parties, who might want to reassure themselves that proper protection of confidentiality is in place, to insert a precise clause providing for the confidentiality of arbitration proceedings and awards in their commercial contracts. It is important that such parties diligently choose seats and rules providing for a strong policy on confidentiality.

Thomas Snider and Camelia Aknouche's article was previously published on the Al Tamimi & Company web site—October 2017. Published with permission.

ERRORS IN TECHNICAL STANDARDS IN AN INFRASTRUCTURE CONTRACT—WHO BEARS THE RISK?

MT HØJGAARD A/S (RESPONDENT) V E.ON CLIMATE AND RENEWABLES UK ROBIN RIGG EAST LIMITED & ANOR (APPELLANTS) [2017] UKSC 59

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INTRODUCTION

Almost all infrastructure contracts incorporate numerous technical and commercial requirements, regularly forming annexures or schedules to the contractual terms.

Often, a key requirement may be buried amongst many hundreds of pages of other technical requirements. It is also quite common for industry standards to be incorporated by reference into those technical requirements.

A recent United Kingdom Supreme Court case (*MT Højgaard A/S (Respondent) v E.ON Climate and Renewables UK Robin Rigg East Limited & Anor (Appellants)* [2017] UKSC 59), which focused on whether a provision relating to fitness for purpose was breached, highlights the risks to both parties involved in this approach to contracting.

Key takeaways from the decision for contracting parties include:

- avoiding the risk that a standard may be out of date or incorrect by specifying the standard as the 'minimum' requirement;
- ensuring that the contract specifies a means for interpreting ambiguities (including imposing a higher standard in the case of ambiguity or inconsistency);
- ensuring that the order of precedence clauses not only delineates between schedules, but (potentially) within parts of schedules; and
- ensuring careful clarification of the impact (if any) of the expiry of the defects rectification period upon the enforceability of longer term warranties as to design and construction.

FACTS OF THE CASE

The case in question concerned a design and construct contract for two offshore wind farms in the Solway Firth being developed by two companies in the E.ON group

... a key requirement may be buried amongst many hundreds of pages of other technical requirements. It is also quite common for industry standards to be incorporated by reference into those technical requirements. A recent ... case ... which focused on whether a provision relating to fitness for purpose was breached, highlights the risks to both parties involved in this approach to contracting.

... the court found that the two provisions could sit together on the basis that the design life obligation should be characterised as a promise that the design of the foundations would last 20 years without replacement.

(E.ON). The wind farms were designed and installed by MT Højgaard A/S (MTH).

Shortly after completion, the foundation structures of the wind farms failed. At issue in this proceeding was the cost of remedial works.

CONTRACTUAL REQUIREMENTS

The contract specified some key requirements which will be familiar to anyone involved with projects of this nature.

There was a technical requirements schedule which specified key functional requirements, the design basis and the design principles for the wind farms.

The key functional requirements included that the works withstand the 'full range of operational and environmental conditions with minimal maintenance' and that the work elements were to be designed 'for a minimum site specific design life of 20 years'.

The design basis stated that the requirements specified were the 'minimum' requirements of E.ON.

A section headed design principles included several requirements including:

- that the design was to be prepared in accordance with standard J101 (an international standard for the design of off shore wind turbines published by Det Norske Varitas) (the standard obligation);
- that the design was to 'ensure a lifetime of 20 years in every aspect without planned replacement. The choice of structure, materials, corrosion protection system operation and inspection programme shall be made accordingly' (the design life obligation); and
- an obligation to ensure that 'all parts of the works […] shall be designed for a minimum service life [of] 20 years'.

In addition, there were a number of key contractual provisions, including:

- an obligation that the works be fit for purpose (fit for purpose obligation), defined as fitness for purpose in accordance with and as inferred from the employer's requirements; and
- an obligation to make good defects arising from materials, workmanship or design for a period of 24 months from the date of take over (defects rectification obligation).

Relevantly, there was an 'entire agreement' provision, and an order of precedence which was (in descending order):

- the form of agreement;
- conditions of contract;
- commercial schedules;
- the employer's requirements (which included the technical requirements schedule).

The J101 standard (the standard) contained an erroneous equation, which ultimately led to the grouted connections failing and the transition pieces slipping down the monopiles.

THE PROCEEDINGS

E.ON argued that MTH had been negligent and breached the contract. MTH's defence was that it had exercised reasonable skill and care and had complied with all contractual obligations.

At first instance, the Technology and Construction Court held that MTH, although not negligent in the design of the foundations, had breached the fit for purpose obligation, which was to be determined by reference to the employer's requirements, which included the technical requirements.

MTH appealed to the Court of Appeal. The Court of Appeal found that the design life obligation appeared to be a warranty that the foundations would function for 20 years. However, the Court of Appeal held that the warranty was inconsistent with other provisions of the contract, and accordingly, that the other provisions should prevail. It found that the design life obligation was 'too slender a thread' to sustain an argument that MTH had given a warranty that the foundations would last for a 20 year lifetime.

E.ON appealed to the United Kingdom Supreme Court, and this appeal was allowed.

DOES THE CONTRACTOR WEAR THE RISK OF THE ERROR IN THE STANDARD?

Given that the standard was incorrect, the court needed to consider whether the fit for purpose obligation was inconsistent with MTH's obligation to construct the works in accordance with the standard.

The court referred to a line of cases in the United Kingdom and Canada in which it was found that a contractor was liable for a defect which was the result of a requirement or obligation that could not be fulfilled (giving the examples of a model approved by the customer, a pattern approved by the purchaser and plans and specifications provided by a principal).

The court pointed out that where a contract requires an item to be produced in accordance with a prescribed design and with prescribed criteria, and where conformity with the design will inevitably result in the product falling short in relation to the criteria, it 'by no means follows that the two terms are mutually inconsistent'.

Here, the court noted that the technical requirements stressed that the requirements in the section were minimum requirements, and that the technical requirements required MTH to identify any areas where the works needed to be designed to a higher standard (and indeed, MTH was permitted to depart from the standards). Further, the court stated that the correct way to interpret the two provisions was to conclude that the most 'rigorous or demanding' of the two standards must prevail.

DOES THE DESIGN LIFE OBLIGATION BIND THE CONTRACTOR?

MTH argued that the design life obligation was 'too slender a thread' on which the important and potentially onerous obligation of ensuring a 20 year lifetime of the foundations (design or otherwise) should rest. MTH relied on a number of factors here, including:

- the inelegant drafting of the contract documents;
- the inclusion of an important obligation in a technical document; and
- that the obligation was not given pre–eminence, but rather 'tucked away' in a schedule.

Lord Neuberger did not accept these contentions. His Lordship found that the natural meaning of the words were not 'improbable or unbusinesslike', and did not have a redundant meaning. The court also found nothing unusual in the location of the promise.

WHAT DOES THE DESIGN LIFE OBLIGATION MEAN?

MTH argued that it could not have been intended by the parties that the design life obligation constituted a warranty that the foundations would last for 20 years and that the defects rectification obligations meant that claims in relation to defects were barred after 24 months.

Ultimately, the court found that the two provisions could sit together on the basis that the design life obligation should be characterised as a promise that the design of the foundations would last 20 years without replacement.

In this way, E.ON's ability to rely on the design life obligation would not be dependent on a realisation that the foundations were failing within the 24 months defects rectification period but rather becoming aware during that period that the design of the foundations would not last for 20 years.

However, the court decided it did not need to reach a conclusion on this issue.

Jane Hider and Sophia Georgeff's article was previously published on the Corrs Chambers Westgarth web site—August 2017. Published with permission.

SUBPOENAS UNDER THE IAA—FOREIGN–SEATED ARBITRATIONS NEED NOT APPLY

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HOW IT AFFECTS YOU

• The decision—in *Re Samsung C&T Corporation* [2017] FCA 1169—suggests that Australian courts will narrowly interpret the scope of their jurisdiction to support foreign arbitration in obtaining evidence on the basis that the *International Arbitration Act's* (the IAA) scope only extends to international arbitrations seated domestically.

• This decision limits parties in foreign–seated arbitrations from obtaining evidence available in Australia, even where a nexus exists between the parties to the arbitration and Australia.

• Australian documents and witnesses cannot be compelled unless an international arbitration is seated in Australia.

• Parties who expect that crucial evidence for a foreseeable dispute may be located in Australia should designate an Australian seat in the arbitration agreement or agree to an Australian seat at the outset of the arbitration. This is particularly important for parties with disputes that would otherwise be seated in non–contracting states of the Hague Evidence Convention.

THE FACTS

On 5 September 2017, Samsung C&T Corporation filed a request for a subpoena to obtain evidence for use in an arbitration, seated in Singapore and administered by the Singapore International Arbitration Center (SIAC), under the UNCITRAL Rules, currently on foot between Samsung and Duro Felguera Australia Pty Ltd. Both parties have related Australian entities.

In assessing whether the Federal Court could grant Samsung's request, Justice Gilmour first considered section 22A of the IAA, the Interpretations section, so as to determine whether the Federal Court of Australia was the proper jurisdiction in which to bring the request. Relevantly, 'court' is defined as:

(a) in relation to arbitral proceedings that are, or are to be, conducted in a State—the Supreme Court of that State; and

(b) in relation to arbitral proceedings that are, or are to be, conducted in a territory:

(i) the Supreme Court of the territory; or

(ii) if there is no Supreme Court established in that territory—the Supreme Court of the state or territory that has jurisdiction in relation to that territory; and

(c) in any case—the Federal Court of Australia.

Samsung argued that the *Singapore International Arbitration Act* (Cap 143A, 2002 Rev Ed) (the SIAA) can only compel evidence in Singapore and therefore it is only through the IAA that evidence located in Australia can be compelled. Samsung further reasoned that even if there were territorial limits on the Federal Court of Australia, there was sufficient nexus between the dispute and Australia for evidence from Australia to be compelled through the courts of Australia.

Justice Gilmour also considered that the intention of the Federal Government in introducing and amending the IAA was to encourage international arbitrations seated in Australia.

THE DECISION

Justice Gilmour held that he did not have jurisdiction to grant the request for a subpoena in Australia because:

• 'in any case', the third limb of the definition of 'court', should be interpreted narrowly to be consistent with the intention of the IAA and to not unnecessarily read words into the phrase. Consequentially, the Federal Court only has jurisdiction where a state/territory court would have jurisdiction.

• the IAA only applies to arbitrations commencing or taking place in Australia for the following reasons:

  • Article 1(2) of the Model Law provides that it applies only to international arbitrations seated in the state in which the Model Law has been adopted. When enacting the Model Law, a legislating state may expand on this provision;

  • Part II of the IAA expressly relates to 'foreign awards', whereas Part III does not make a similar distinction to cover foreign arbitral proceedings;

  • the intention of the IAA was to help develop Australia as a regional hub for international arbitration; and

  • when the Federal Government reviewed the Federal Court's jurisdiction over international arbitration matters in 2008, the Federal Court was given concurrent jurisdiction to state and territory courts, meaning that either a state or territory are the only jurisdictions for the IAA to apply.

Justice Gilmour suggested that parties should instead avail themselves of the Hague

Convention on the Taking of Evidence Abroad in Civil or Commercial Matters of 18 March 1970 (the Hague Evidence Convention).

To do so, a party must obtain permission from the arbitral tribunal, obtain a letter executed by the judicial authority in which the arbitration is seated, and then bring that letter before the courts of Australia for recognition and execution.

COMMENT—AN IMPRACTICAL INTERPRETATION OF THE IAA

Justice Gilmour's decision reflects the view held by other jurisdictions, particularly those that have adopted the UNCITRAL Model Law. However, when comparing section 23 and the other provisions considered 'optional' in Part III of the IAA, and considering the practicalities that arise from his decision, Justice Gilmour's interpretation may be at cross purposes with the objectives of international arbitration.

An alternative interpretation of the consequences of the adoption of the Model Law for Part III of the IAA may mean that it applies equally to foreign–seated awards. As the Federal Government expressly chose not to adopt the exact language of the Model Law in Part III, it is equally acceptable that section 23 should apply to foreign–seated arbitrations.

Article 27 of the Model Law, 'court assistance in taking evidence', states:

The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

Article 27 constrains a party from seeking evidence from another jurisdiction, by designating that the request be from 'a competent court of this State'. However, the Federal Government chose to adopt more fluid language in section 23 of the IAA, which contrary to article 27 of Model Law, provides that a party may seek evidence from 'a' court. The narrow interpretation of 'court' in section 22A indicates that 'any' should actually mean 'either'.

A broader interpretation of 'court' is consistent with section 23(2), which places the primary condition precedent on the section, namely that a party may only obtain a subpoena with the express permission of the arbitral tribunal. With this mechanism in place, section 23 ensures that courts act in support of the arbitral tribunal's proceedings.

By interpreting section 23 (and, in turn, the purpose of the IAA) narrowly to only cover international arbitrations seated in Australia, Justice Gilmour permits a gap in the arbitral proceedings for foreign–seated arbitrations requiring evidence in another jurisdiction. For the approximately 60 jurisdictions that have adopted the Hague Evidence Convention, as Justice Gilmour suggested, a solution is available, albeit a more costly and time–consuming solution (two characteristics that international arbitration endeavours to avoid). For all other jurisdictions, a party, even one with a strong nexus to Australia, cannot obtain evidence that may be critical to the arbitral proceedings.

A broader interpretation of section 23 of the IAA would be consistent with the intent of international arbitration to serve as a transnational tool, supported by domestic courts. This interpretation would follow France and a growing number of jurisdictions in the United States, wherein a party may obtain evidence within the jurisdiction if the evidence itself is located within that jurisdiction.

For example, the Southern District of New York (*In re Ex Parte Application of Kleimar NV*, No 16–MC–355, 2016 WL 6909712 (SDNY Nov. 16, 2016)) recently permitted a party to a foreign arbitration (seated in London) to obtain a subpoena for a non–party to the arbitration on the basis that there was enough of a connection of the third party to New York.

Providing discretion to Australian courts, on the basis that an arbitral tribunal has already considered the evidence to be necessary, would provide greater efficiency for users of international arbitration.

Nick Rudge and Caroline Swartz–Zern's article was previously published on the Allens Linklaters web site—October 2017. Published with permission.

QUANTIFICATION OF DELAY AND DISRUPTION IN CONSTRUCTION AND ENGINEERING PROJECTS

By Robert J Gemmell

Published by Thomson Reuters (Professional) Australia Limited (2017)

838pp, RRP $220 (hardcover)

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This book of seven chapters and 838 pages is written by a quantity surveyor who has had over 25 years of experience in the construction and engineering industry internationally. He has had a hands–on role as advisor and quantity surveyor acting for employers and contractors, as well as in the prevention and resolution of disputes concerning the quantification of loss caused by delay and disruption to the progress of construction work.

The book was written to provide practical guidance to quantifying loss caused by delay and disruption. It includes detailed practical scenarios based on decided case law.

The book's 838 pages on the quantification of delay and disruption loss initially looks very daunting, until it is realised that two thirds of the pages are devoted to substantial extracts from relevant case law. The author's text itself is a manageable and accessible 266 pages.

The forward to the book is by the Hon Justice Peter Vickery, judge in charge of the Technology, Engineering and Construction List of the Victorian Supreme Court. His Honour notes that the subject matter is not only written for application in Australia, but also internationally, and is a unique complement to the fifth edition of the well–known *Delay and Disruption in Construction Contracts*.

Chapter 1 describes the purpose of the book as intended to be a practical guide to quantification of loss caused by delay and disruption, covering: (1) planning and programming of a construction project; (2) the methods of delay analysis; and (3) the methods used to quantify financial loss caused by delay and disruption.

The first and second editions of the Society of Construction Law Protocol are discussed, and the changes to the 2017 second edition highlighted. The differences between delay and disruption are discussed by reference to a United States case and the SCL Protocol.

Chapter 2 covers the technical issues of planning and programming, commencing with a short history. The overview of project planning is described from the perspective of the structure required to use current project management software. The techniques used and the various methods of presentation of results from the software are covered in more detail under the sections of CPM Program, Gantt Chart, Network Program, and Line of Balance.

These are illustrated with appropriate diagrams that make the concepts clear. Commonly used terminology of program levels, baseline programs and method statements are described. There is a very useful and practical section on checking, review and updating a CPM program that should be compulsory reading for every contractor that expects to be able to use its updated programs to support extension of time claims. This is supported by a scenario based on a case in which the contractor's programme was manipulated to disguise periods of delay, which the court ultimately found was misleading and ineffective. The chapter concludes with a section on planning and programming using Oracle Primavera P6, perhaps the most widely used planning software used internationally in the construction industry.

Chapter 3 is on extensions of time (EOT). The benefits of an extension of time for the contractor and employer are briefly discussed.

The topic of notice of delay is covered in some detail, illustrated with several case law scenarios. The importance of a notice of delay as a condition precedent to a contractor's entitlement to an EOT is emphasised by the scenario based on the recent Australian case of *CMA v John Holland*.

Time at large and the prevention principle are given a detailed treatment, illustrated with a number of case law scenarios that support the author's text. There is a section on float in relation to time that addresses the use and ownership of float, and the contractor's right to complete early, and a section that discusses the distinction between a contractor's contingency for early completion of the works and float. In this reviewer's view, the author has not clearly distinguished between float and contractor's contingency; the use of the term 'end float' for contractor's contingency tends to obscure the significant difference between float (the time a task may be delayed for it to impact the early finish date of a project) and contractor's contingency (the activity between the end of the contractor's critical path and the contractual date for completion). The discussion on ownership of float would have been assisted by reference to the way in which specific standard form contracts deal with this issue. The chapter also discusses non–excusable and excusable delay, and the various approaches to concurrent delay, illustrated with case law scenarios. Whilst the different approaches to concurrent delay are discussed in some detail, the author provides little commentary on these from his own experience.

Chapter 4 is a short chapter on delay analysis. It covers the identification of delays and discusses the difference between an as–planned/baseline program and an as–built program.

Six different methods of delay analysis are described: as–planned versus as–built, impacted as–planned, time impact, windows, longest path and collapsed as–built. The chapter concludes with a brief commentary on which method to use. The contents of this chapter provide a useful and clear summary of the methods of delay analysis currently used, with helpful suggestions as to the available sources of data. There are no case law scenarios presented; this is a topic that could perhaps usefully have been illustrated by (anonymous) examples from the author's own experience.

Chapter 5 is on the quantification of loss caused by delay, covering both contractors' entitlements as well as employers' entitlements. The section on calculation of contractors' delay costs covers the issues of direct additional construction costs, preliminaries (site overheads/indirect job costs), subcontractors, of–site/head office overhead, loss of profit, increased cost of resources/inflation and finance charges and interest. The section on off–site/head office overheads is very useful addition to the literature, covering additional office costs, loss of opportunity and a review of three formula methods of calculation. The details, supplemented by a case law scenario, reinforce the difficulties that contractors face in trying to recover head office overheads.

The section on liquidated damages is almost entirely devoted to the employer's entitlements; the possibility of providing for (liquidated) delay damages for the contractor is acknowledged, but it is suggested that this is hardly ever used. In this reviewer's experience, the benefits to both parties of pre–agreeing the contractor's delay damages are not uncommon in Australia.

This book is a valuable contribution to the literature on two issues that are at the heart of many construction law disputes: time delays and the quantification of costs occasioned by them. It will be a welcome addition to the library of construction practitioners for its coverage of legal issues and cases, as well as construction lawyers for its explanation of the technical aspects of programming and cost quantification and the relevant text of significant cases.

The discussion on liquidated damages highlights the important differences in the approach to penalties between recent Australian and United Kingdom case law, and discusses various defences to a claim for liquidated damages.

Chapter 6 is on the quantification of loss caused by disruption. Disruption is explained and illustrated by loss of productivity graphs derived from research by others. The difficulties of proving disruption are discussed and various methods of calculating loss of productivity listed and briefly described. The detailed steps required to use the measured mile and baseline productivity methods are described, and illustrated with appropriate calculations and graphs derived from three case studies.

The author highlights some of the limitations of the measured mile method, and details his improvements to this method incorporated in the baseline productivity method. The section on acceleration covers instruction to accelerate, contractor's acceleration and the approaches to constructive acceleration in the United States, United Kingdom and Australia. The author discusses how acceleration costs may be incurred, and proving acceleration by reference to a case law scenario.

Chapter 7 is on global claims for delay and disruption, an important topic for contractors. Global claims are described and distinguished from total cost/time claims. A number of sections are devoted to the issue that makes or breaks a global/total cost claim: proof of causation, usually based on inference. Various United Kingdom and Australian cases are referred to illustrate what is required for a successful claim. Apportionment of liability for a claim between the contractor and employer is discussed, and concludes that notwithstanding its application in Scotland, it is unlikely to be available elsewhere unless the contract provides otherwise. The issues of assessment of a global claim, the requirement for a claimant to establish breach, causation, loss, and apportionment are discussed in the three case law scenarios.

The book has a comprehensive index, a bibliography and a list of the cases referred to. Although it has a list of scenarios, figures and tables, there is no list of the cases included in the book. As two thirds of the book is devoted to the text of important cases, it would be very useful to have a separate list of these cases, with their full citation.

Given the use of specific terminology used in relation to programming and delay and disruption, it would have been very helpful if the author had provided a clear definition when a term is first used, and a Glossary of terms for subsequent reference. Terms are sometimes used before their meaning has been explained. For example, the formal definition of critical path is on page 334 in chapter 4, long after the term has been used in other contexts.

The book does not always clearly distinguish between the common law, and contract provisions. For example, in the section on acceleration, the author refers to an employer's instruction to accelerate, without making clear that such an instruction would only be available if it was specifically provided for in the contract; there is no entitlement under the common law for an employer to instruct a contractor to accelerate work to overcome the effect of an employer caused delay. Virtually all standard form and sophisticated bespoke contracts have detailed provisions in relation to time, and discussion of some examples of these would have been of value.

This book provides a useful overview of quantification of delay and disruption for practitioners in the construction industry and lawyers practising in construction law. It assumes a more than passing knowledge of contract law and legal principles; inexperienced practitioners will also need to refer to a text on construction law contracts to understand some of the terminology and concepts referred to by the author. For example, in the discussion on liquidated damages, bringing a contract to an end by recission is discussed, without defining what recission means.

Readers of this work should not be put off by its length. It is really two books in one: a guide to the practical issues involved in quantifying delay and disruption costs in construction projects, and a casebook on judicially decided cases relevant to delay and disruption in different common law jurisdictions.

Many readers of this text may not need to refer to the cases in detail, but for those that do, they will be grateful to the author for providing the judgments in the text, some of which would not be readily available to the average user.

This book is a valuable contribution to the literature on two issues that are at the heart of many construction law disputes: time delays and the quantification of costs occasioned by them. It will be a welcome addition to the library of construction practitioners for its coverage of legal issues and cases, as well as construction lawyers for its explanation of the technical aspects of programming and cost quantification and the relevant text of significant cases.

OBITUARY—DR JOHN WILSON TWYFORD

Myra Nikolich

It is with much sadness that I announce the death of our Editor, Dr John Twyford. John died peacefully on 17 October 2017, surrounded by his loving family.

I met John in 1999 when I worked as a researcher in the Faculty of Design, Architecture and Building at the University of Technology, Sydney (UTS). I had just gone back to Sydney University to study law and found myself a part time job that would enable me to eat during the coming years. John was located in the office next door to my then boss. I witnessed him making time for everyone and everyone making time for him. He was respected by all and his counsel often sought.

It was not long before I too was charmed by John. Before I knew it, he had me involved in the ACLN. There were some comings and goings (by me) until we decided that we made a pretty good team and would produce the ACLN together. We ended up working together on the ACLN for about 15 years—seven of those independently of UTS.

John was a dedicated lawyer and mentor to many students. He had that old–school gentlemanly manner and work ethic; taking his teaching responsibilities seriously and never turning anyone away. He was always gracious and kind, never took people for granted, and often extended himself so that he would not let people down.

John loved his family and took great pride in their achievements. He also loved his small circle of friends, whose friendships he cherished and enjoyed immensely. Unsurprisingly to those who knew John, most are women!

John had an insatiable thirst for knowledge, and a sense of curiosity until the end. In his later years, he was improving his Latin and learning to play the recorder.

As his friend, I owed him honesty—I could only encourage him in the pursuit of one of these activities.

I was always in awe of John's memory, which was phenomenal. He could remember cases in detail when I couldn't even remember the name of the case.

John had great depth and breadth of knowledge which he never tired of sharing with me. Most conversations, however, turned to food. We must have spent weeks, if not months, over the years discussing in detail how we cook our eggs—often the numerous and varied methods, but in particular, the finer points of poaching. We never quite got it right.

John was more than my mentor and work colleague—he was my dear friend and I will always miss him.

In this short tribute, I wanted to give those of you who didn't know John a glimpse of the man.

John Twyford, ave atque vale!

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