

# Construction Law Update

July 2021

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# Legislative update

## NEW SOUTH WALES

### Builder beware – new residential building regulation commenced 1 July 2021

*Design and Building Practitioners Regulation 2021 (NSW), Design and Building Practitioners Amendment (Miscellaneous) Regulation 2021 (NSW) and Building Legislation Amendment Act 2021 (NSW)*

Andrew Hales | William Vu

#### New regulation on residential building work in NSW has commenced

On 1 July 2021, the *Design and Building Practitioners Act 2020 (NSW) (DBP Act)* fully came into force. The *Design and Building Practitioners Regulation 2021 (NSW) (DBP Regulation)* confirms that designers, builders and developers involved in the construction of a class 2 building or a building containing a class 2 part must be registered. During such construction, there are specific lodgement points for designs and forms to be used to declare class 2 building work is compliant with the BCA and government guidance documents. Significant penalties and investigative and enforcement powers apply to builders and designers, including directors of companies.

For a full summary of the obligations under the DBP Act, see our alert [here](#).

#### Further amendments from 1 July 2021

Further amendments were made to the *Residential Apartment Building (Compliance and Enforcement) Act 2020 (NSW) (RAB Act)* and the DBP Act. Of particular interest to developers and builders working on residential apartment buildings, the *Building Legislation Amendment Act 2021 (NSW)* allowed for the imposition of a levy on developers, increased penalties under the RAB Act and clarified the lodgement point for varied designs under the DBP Act.

The *Design and Building Practitioners Amendment (Miscellaneous) Regulation 2021 (NSW)* also updated knowledge and registration requirements for a number of classes of practitioners, confirmed a grace period until 30 June 2022 for practitioners to obtain insurance under the DBP Act and included transitional provisions for Crown building work.

For more details on these amendments, see our alert [here](#).

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## WESTERN AUSTRALIA

### New WA security of payment regime is enacted

#### *Building and Construction (Security of Payment) Act 2021 (WA)*

Sophie Wallwork

The *Building and Construction (Security of Payment) Act 2021 (WA) (Act)* received assent on 25 June 2021. The Act will implement significant changes to WA's security of payment regime to bring it more in line with other Australian jurisdictions. The Act will be implemented in stages over the next 12-18 months to allow the industry to adapt to the reforms and the supporting regulations to be finalised. Despite its staged implementation, the Act will apply to all construction contracts entered into in WA after the commencement date. Contracts entered into before that date will fall under the current *Construction Contracts Act 2004 (WA) (CCA)*.

The definitions of 'construction work', 'civil work' and 'related goods and services' under the Act are not much different to the existing definitions under the CCA and the exclusion of works in respect of resources extraction still applies, albeit much more narrowly. Other changes to the Act are aimed at increased



'fairness', including several key changes to the adjudication process. The Act will require adjudication applications to be made within 20 business days of a payment dispute arising (rather than the previous 90 days) and prohibit a respondent from raising new reasons in an adjudication response that were not included in the payment schedule (noting that no such prohibition exists under the current regime). The Act will also introduce a statutory right to progress payments and allow for notice-based time bars to be declared unfair in particular circumstances.

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## In the Australian courts

### NEW SOUTH WALES

#### Too little too late – know your limitation periods

##### *Calibre Construction Corp Pty Limited v Bayside Council* [2021] NSWSC 758

Andrew Hales | Jessica Nesbit | Ashleigh Blumor

#### Key point

Whether it be a claim for monies owed or a claim for failure to comply with a defect rectification notice, the message is the same: knowing the length of the limitation period is key. The practical implications of failing to consider the expiry date of a limitation period or length of a limitation period are potentially very expensive.

#### Facts

In 2009, Bayside Council (**council**) approved a development to be undertaken by Calibre Construction Corp Pty Limited (**developer**) to design and construct two tower buildings containing 182 residential units.

Certain financial contributions for the benefit of the public were imposed by the council as part of the conditions of consent to the development under section 94 of the *Environmental Planning and Assessment Act 1979* (NSW) (**Development Contributions**). Under a Works-in-Kind Agreement dated 25 January 2012 (**WIKA**) between the developer and the council, the developer undertook specified public works as payment in kind towards the Development Contributions. As part of those public works, the developer completed and handed over roadworks in October 2012.

The developer began proceedings in October 2019 (almost seven years after completing and handing over the roadworks) requiring bank guarantees held by the council totalling \$400,000 to be delivered up. The developer asserted that it had no further liability, or at least no further enforceable liability, under the WIKA. The council denied the developer's claim, cross-claiming that the developer owed the council a debt under the WIKA of approximately \$650,000 attributable to the value of the roadworks (**Developer Contribution Claim**). In its arguments, the council also contended that the developer failed to complete several testing and documentation tasks required under the WIKA (although the council did not issue a formal cross-claim) (**Defect Claim**).

#### Developer Contribution Claim

The total amount of the Development Contributions was \$2.1 million. This was to be satisfied in part by the developer undertaking the roadworks and two other items of work. The value of the other items was agreed, but at the time of entering the WIKA, the value of the roadworks could not be agreed and was to be fixed by a quantity surveyor (**QS**) retained by the council under the expert determination procedure prescribed by the WIKA. Any shortfall between the value of the works to be performed and the Development Contributions was to be paid by the developer in cash. In 2013, the council appointed a QS to determine the value of roadworks, but there was a dispute between the parties as to the QS's determination which was heard by the Supreme Court in 2015 (refer to *Rockdale City Council v Calibre Construction Corp Pty Limited* [2015] NSWSC 1980).

In those proceedings, the developer disputed the liability to pay the Development Contributions shortfall on the basis that the value of the roadworks determined by the QS was too low and that the expert



determination had not been validly undertaken in accordance with the WIKA. Fagan J held that the QS's determination did not fulfil the requirements of the WIKA because it failed to allow for the costs of pavement removal, excavation and removal of spoil, all of which were necessary for the roadworks. His Honour concluded that the purported determination had no contractual effect.

Following this decision, the council re-started the expert determination process and the QS produced a further determination in August 2016 (almost four years after the completion of the roadworks). The council, however, only issued a formal notice requiring the developer to pay the Developer Contributions shortfall in November 2019 (after the developer commenced the current proceedings). The developer argued that, as a matter of construction of the WIKA, its liability to pay arose in 2012 when the works were completed and that any such liability was statute-barred (being outside of the six-year limitation period).

The council contended that the developer's liability to pay only arose once the council issued its formal notice in November 2019. The council asserted that, on the developer's construction of the WIKA, the developer's obligation to pay would arise before the amount payable had been determined by the QS in 2016 and that this did not make practical sense. The council argued that the court should avoid a construction that would give rise to a result which is capricious or otherwise contrary to business common sense.

The council also argued that the 2015 judgment created an issue estoppel which prevented the developer from advancing the current proceedings.

### Defect Claim

In 2013, the council served a defect rectification notice on the developer, which was disputed by the developer, and correspondence between the parties continued for a period of two years. The developer never complied with the notice and the council never took any further action. The developer claimed that any liability it had in respect of the defect notice was now statute-barred.

### Decision

The council's Developer Contribution Claim and Defect Claim were statute-barred.

In relation to the council's contention of issue estoppel, Parker J held that, because the earlier proceedings did not deal in a final way with the council's contractual claim and the findings were instead confined to the determination of the contractual validity of the expert's determination, the council's issue estoppel argument failed.

In respect of the payment of the Developer Contributions shortfall, Parker J determined that the WIKA required payment of the monetary contribution to be made by the developer by the sooner of the date of the first occupation certificate (being 12 October 2012) or the date on which the notice for payment was served (being 21 November 2019).

The council's cross-claim was deemed, for the purposes of the *Limitation Act 1969 (NSW)* (**Limitation Act**), to have been made on the date on which the proceedings were commenced (i.e. October 2019). This was almost seven years after the issue of the first occupation certificate (being the date the WIKA required payment of any monetary contribution) and therefore out of time.

His Honour also rejected the council's contractual interpretation argument of business common sense on the basis that the principle upon which the council relied *'is only available in cases where there is a sufficient degree of ambiguity or uncertainty in the contractual language to allow it to operate'*. His Honour stated that the council's interpretation would *'mean that the accrual of the cause of action could be deferred indefinitely by the Council failing to issue a notice'* requiring payment. Parker J held that the Developer Contribution Claim was statute-barred.

Parker J determined that the council's Defect Claim was also statute-barred on the basis that the council's cause of action arose on the date that the rectification work was required to be completed under the WIKA (i.e. 10 November 2013). His Honour noted that, had a cross-claim been made in the current proceedings by the council, the council would probably be in time because of the effect of section 74 of the Limitation Act (which provides that a cross-claim is deemed to have been made on the earlier of the date on which the person becomes a party to the principal action and the date on which the person becomes a party to the claim).

His Honour concluded that, on the face of it, the developer was entitled to the return and cancellation of the bank guarantees on the basis that the security did not cover statute-barred liabilities (being the Developer



Contribution Claim and the Defect Claim) and that there were no other outstanding claims by the council. At the request of the council, however, Parker J did not make any final orders on this point as the council had since brought proceedings in the Land and Environment Court concerning the developer's compliance with the development condition requiring the Development Contributions and it was open to the council to contend in those proceedings that it is entitled to retain the security.

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## Pleading a claim 101: 'Join the Dots'

### *Cohen v Double Bay Bowling Club (No 2)* [2021] NSWSC 872

Andrew Hales | Sophie Wallwork | Jonin Ngo

#### Key points

A cause of action properly pleaded must include all facts required to establish the claim (e.g. the facts required to establish each limb of a statutory duty of care, breach of that duty, causation and loss).

The principles arising from this case indicate the approach that a court may take towards pleadings based on the new duty of care imposed by the *Design and Building Practitioners Act 2020* (NSW), which will be relevant to construction industry participants.

#### Facts

This case concerns an alleged breach of section 177 of the *Conveyancing Act 1919* (NSW) (**Conveyancing Act**), which establishes a statutory duty of care not to do anything on or in relation to land (**the supporting land**) that removes the support provided by the supporting land to any other land (**the supported land**).

The plaintiffs, who owned a home in Double Bay, were neighbours of the adjoining property, Double Bay Bowling Club (**Club**). The Club had engaged a builder to construct a dual occupancy on the Club's land (**builder**). The builder then engaged a piling contractor to carry out excavation and piling works (**piling contractor**). The plaintiffs alleged that the piling works had removed support to their land and caused damage to their home and brought proceedings against the Club, the builder and the piling contractor.

The Club filed a notice of motion seeking an order that the proceedings against the Club be dismissed. On the day of the hearing of the notice of motion, the plaintiffs sought leave to file an amended list statement which outlined their case against the Club based on section 177.

The plaintiffs alleged, amongst other things, that the Club was responsible for the actions of the piling contractor on the basis that the duty of care imposed by section 177 was non-delegable. In that regard, section 5Q of the *Civil Liability Act 2002* (NSW) (**Civil Liability Act**) provides that:

*'The extent of liability in tort of a person (the defendant) for breach of a non-delegable duty to ensure that reasonable care is taken by a person in the carrying out of any work or task **delegated or otherwise entrusted** to the person by the defendant is to be determined as if the liability were the vicarious liability of the defendant for the negligence of the person in connection with the performance of the work or task.'* (emphasis added)

#### Decision

The court refused leave to the plaintiffs to file the amended list statement to the extent it affects the Club and ordered that the proceedings against the Club be dismissed.

#### Non-delegable duty

The court proceeded on the assumption that it was arguable that the duty in section 177 is non-delegable. Therefore, the question then posed by section 5Q of the *Civil Liability Act* was whether it could be shown that the Club '*delegated or otherwise entrusted*' the piling works to the piling contractor.

The court found that the plaintiffs' list statement did not establish that the Club had delegated the piling works to the piling contractor, rather the plaintiffs had pleaded that the Club engaged the builder to carry out the works (i.e. the work was delegated to the builder and not to the piling contractor). It could not therefore be



held that the Club had breached the duty by failing to ensure the piling contractor took reasonable care in carrying out the piling works.

### Breach of duty

The duty of care imposed on the Club by section 177 was not to 'do' anything on or in relation to the Club's land that removed support provided by the Club's land to the plaintiffs' property.

The plaintiffs alleged that the piling works carried out by the piling contractor (which included the hammering of steel beams into several piles using the bucket of an excavator) caused excessive vibrations on their property and the Club's land, removed the support provided by the Club's land to the plaintiffs' property, and accordingly was a breach of the duty of care imposed by section 177.

The court held that the plaintiffs' amended list statement simply made the assertion, but without any facts to show, that the piling works led to the removal of support by the Club's land to the plaintiffs' land. The court rejected the plaintiffs' argument that these facts were a matter for evidence. Rather, these facts should have been pleaded within the list statement.

In any event, the court found that the expert report prepared by the plaintiffs' geotechnical expert (on which the plaintiffs intended to rely to prove the required facts) did not establish the causal link required to establish a breach of duty under section 177.

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## Lowering a proposed contract price may win you a hole, but lose you the game

### *Jabbcorp (NSW) Pty Limited v Strathfield Golf Club [2021] NSWCA 154*

Andrew Hales | Emily Miers

### Key points and significance

The terms of the contract, when read as a whole, may act to broaden the scope of work that a builder thinks is captured by the contract such that work the subject of an alleged variation is already included under the contract, eliminating the right of the builder to seek further payment.

The meaning of the words '*Notwithstanding any other clause*' in a definition is directed to the hierarchy of that clause in the event that it conflicts with another. However, that wording doesn't establish that there is a conflict in the first place.

It is sometimes suggested that builders who enter into contracts on a guaranteed maximum price basis seek to rely on variations to achieve increased profit margins and raise the price of a contract. However, this case shows that the court is not prepared to put the legal meaning of written contract terms to one side in favour of such a pricing strategy.

### Facts

The first instance decision was covered in our *November 2020 to January 2021* edition of Construction Law Update. In summary, Jabbcorp (NSW) Pty Limited (**builder**) entered into a modified form of the AS4902-2000 contract on 23 December 2016 (**contract**) with Strathfield Golf Club (**golf club**) to design and construct a new clubhouse, an access road and associated works.

Before entering into the contact, the builder and the golf club engaged in negotiations in relation to the contract price and contract inclusions. The builder submitted a tender for a total price of \$27.15m and later submitted a revised tender for a total price of \$22.5m, which included numerous cost reductions and qualifications. The golf club offered the project to the builder for a contract price of \$22.5m on a guaranteed maximum price (**GMP**) basis.

In the first instance proceedings, the builder sought payment for variations, a bank guarantee fee and to recover amounts withheld for back-charges and liquidated damages. The work the subject of the variations and back-charges was outside the footprint of the clubhouse and access road. The issues for determination in the first instance judgment included, amongst others, whether the work the subject of the variation claims



was included in the contract sum despite the builder arguing that it was 'Excluded Works' as defined in the contract.

The definition of 'contract sum' in the contract was:

*the sum set out in the Formal Instrument of Agreement but excluding:*

- (a) any additions or deductions which may be required to be made under the Contract;*
- (b) the cost of the Excluded Works and works associated with the Excluded Conditions; and*
- (c) any other payments required to be made as stated elsewhere in this Contract.*

There were 37 paragraphs identifying 'Excluded Works' in the definition, from paragraph (a) to paragraph (kk). 'Excluded Works' was relevantly defined as follows:

*Notwithstanding any other clause means the following works which do not form part of the Contract Sum and if required to be carried out, will constitute a variation under this Contract*

...

*(u) Any works required on the golf course and outside the construction boundary of the Site, including if those requirements are pursuant to the Development Consent...*

## First Instance Decision

The Supreme Court dismissed the builder's claim, holding that the work the subject of the variations was part of the original contract scope of work and therefore included in the contract sum. The builder was not entitled to claim variations or recover amounts withheld for back-charges and liquidated damages.

## Appellate Decision

The builder's appeal was dismissed with costs.

The builder accepted that the works subject of the variations were 'Works' which had to be done under the contract. However, the builder argued that all of the works falling within the variations were also 'Excluded Works' and did not form part of the contract sum, relying on what it asserted to be the ordinary literal meaning of subparagraph (u) of the definition.

The golf club's argument is best summarised from its oral submission:

*'the words 'if required to be carried' and 'will constitute a variation' do not contemplate work which must be done under the contract. Those words only contemplate work which may be done if a decision is made that they are required. So we submit that the ordinary, reasonable businessperson reading that clause would assume - and reasonably, that ... 'if required to be carried out' describes a class of work not currently the subject of an existing contractual obligation.'*

Noting the builder accepted that the works subject of the variations were 'Works' which had to be done under the contract, the golf club submitted that the builder could not successfully argue that they were also 'Excluded Works'.

The Court of Appeal dismissed the builder's argument that all of the works falling within the variations were 'Excluded Works'. The Court of Appeal acknowledged that the golf club's '*construction is the legal meaning of the definition*' (emphasis added) but the court's reasons act as a cautious recap of how contractual clauses will be read, in that:

- the legal meaning of the definition '*cannot be resolved by mere grammatical considerations alone*';
- '*the clause must be read as a whole*';
- there was an '*oddity*' in the builder's construction that work the subject of the variation was 'Works' and 'Excluded Works'; and
- the builder's interpretation of the phrase '*Notwithstanding any other clause*' in the definition was akin to a reading that the clause '*trumped*' all others, but this couldn't be used to resolve the interpretation issues asserted.

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## Pleadings and prejudice: a warning tale

### *The Owners – Strata Plan No 89005 v Stromer* [2021] NSWSC 853

Andrew Hales | Jessica Orap | Jenny Cohen

#### Key points and significance

A builder or developer must ensure they plead the limitation defence under section 18E of the *Home Building Act 1989* (NSW) (**HBA**) if they consider that a claim for breach of the statutory warranties in section 18B of the HBA has been brought against them outside the relevant limitation period. If the defence is not pleaded, it will not be considered by the court.

The court's discretion to grant leave for a party to amend its pleadings must be exercised in accordance with the dictates of justice under section 58 of the *Civil Procedure Act 2005* (NSW) (**CPA**). When exercising such discretion, the court may balance the prejudice the applicant may suffer as a result of not granting leave against the prejudice the other party may suffer as a result of granting leave. The court may consider the history of the proceedings and the construction of the earlier pleadings.

#### Facts

The builder and the developer entered into a contract before February 2012 to construct a residential apartment building (**contract**). The residential building works were completed on 19 November 2013.

#### The proceedings

On 20 September 2019, the owners commenced proceedings against the builder and the developer (**respondents**) for breach of the statutory warranties in section 18B of the HBA. The respondents argued that pursuant to section 18E of the HBA (in the version of the HBA that applied at the time the proceedings commenced) the alleged defects were not 'major defects', the relevant limitation period was 2 years from the date the works were completed, and the owners' claim was therefore time barred.

On 3 February 2020, the owners' lawyers notified the respondents by correspondence that the relevant limitation period was the 7-year warranty period for all types of defects (being the limitation period in force before the 2011 amendments to section 18E of the HBA came into effect on 1 February 2012 (**2011 amendments**)). The owners argued that this limitation period applied because in accordance with section 109 of Schedule 4 to the HBA, the 2011 amendments do not apply to a contract for residential building work entered into before 1 February 2012.

On 20 March 2020, the respondents filed an amended list response whereby the respondents withdrew the limitation defence and did not introduce any new limitation issue.

#### The notice of motion

On 22 June 2021, the respondents filed a notice of motion seeking leave to amend their list response to raise a limitation defence and to cross claim against five subcontractors. The respondents argued that if the applicable HBA was the version in force at the time the works were completed on 19 November 2013, then the alleged defects were not structural defects, the statutory warranty period was 2 years from the completion of the works and the owners' claim was time barred. This was on the basis that the 2011 amendments to section 18E in the HBA applied to the notional contract between the owners and the developer and not to the construction contract between the builder and the developer.

Below is a summary of the relevant limitation periods set out in section 18E of the HBA at relevant points in time:

Date	Limitation Period
Before the 2011 amendments	7 years after the completion of the work to which it relates; or 7 years after, if the work is not completed: <ul style="list-style-type: none"><li>– the date for completion of the work set out in the contract; or</li><li>– if there is no date, the date of the contract.</li></ul>





Date	Limitation Period
After the 2011 amendments	6 years for a breach that results in a structural defect; or 2 years in any other case.
2014 amendments to the HBA (being the current position)	6 years for a breach that results in a major defect; or 2 years in any other case.

## Decision

### Discretion under the Civil Procedure Act

The court did not grant the respondents leave to amend their pleadings to raise the limitation defence on the basis that it would be contrary to the overriding purpose and dictates of justice under the CPA. The court balanced the possible prejudice the owners may suffer if leave were to be granted versus the possible prejudice the respondents may suffer if leave was not granted.

The court considered the history of the proceedings, which included the respondents pleading the limitation defence initially in December 2019, withdrawing this limitation defence in March 2020 after the owners notified the respondents that the 2011 amendments did not apply to the construction contract, and then attempting to re-plead the limitation defence in respect of the notional contract, over a year later in June 2021. In this context, the court considered that the respondents were the cause of any prejudice they may suffer.

The owners demonstrated that they would be prejudiced if leave was granted because the owners relied on the respondents' withdrawal of the limitation defence in March 2020 in deciding not to join the builder's subcontractors to the proceedings. If leave were to be granted for the respondents to amend their pleadings, the owners would be time barred from claiming against the subcontractors, because the applicable limitation period for the subcontracts expired in November 2020.

In balancing these considerations, the court decided in favour of the owners.

The court also refused to grant the respondents leave to cross claim against subcontractors because the respondents did not plead any material facts in support of the allegations that each subcontractor breached implied terms, statutory warranties or duties of care.

### Limitation period for notional contract

While the court did not directly address the question of whether or not the reference to '*a contract for residential building work*' in section 109 of Schedule 4 to the HBA is a reference to the notional contract or a reference to the construction contract, the court noted that the respondents admitted that the work was done under a contract to do residential building work and that the respondents did not mention the notional contract. The court also commented that work cannot meaningfully have been done under a contract other than the actual contract, being the one that existed at the time the work was done. This view was expressed despite the court recognising that the HBA does allow in the future for work to be treated '*as if*' it had been done under a notional contract which did not exist at the time the work was done.

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## Think 'about' every word

### *Electrical Licensing Committee v Whatalec Pty Ltd & Brindley* [2021] QSC 159

Andrew Orford | Alexandria Hammerton | Mikayla Colak

#### Key point

This case provides a lesson in the importance of statutory interpretation. If a word or expression used in legislation is defined for the purposes of that legislation, all of the words included in that definition are relevant. A court construing a statutory provision must strive to give meaning to every word of the provision.

#### Facts

In this case, the Electrical Licensing Committee (**Committee**) applied for the dismissal of applications by Whatalec Pty Ltd and its qualified technical person, Michael Paul Brindley, (**Whatalec**) for statutory orders of review. Whatalec sought judicial review of the Committee's decisions under sections 121(1)(a) and 121(1)(b) of the *Electrical Safety Act 2002* (Qld) (**Act**). The decisions by the Committee were that, first, a ground existed for taking disciplinary action and, second, that disciplinary action was to be taken.

#### The Electrical Safety Act

The Act deals with the Committee's decision-making about disciplinary action, and sections 121(1)(a) and 121(1)(b) identify the three decisions the Committee must make:

##### **121 Decision about taking disciplinary action**

- (1) *As soon as practicable after completing the disciplinary hearing, the licensing committee*
  - (a) *must decide whether the ground exists for taking disciplinary action against the person; and*
  - (b) *if the committee decides that the ground exists for taking disciplinary action against the person—must decide whether disciplinary action is to be taken, and if so, the details of the disciplinary action; and*
  - (c) *must give the person a written notice informing the person of what the committee has decided.*

Section 172 of the Act permits a person whose interests are affected by a 'disciplinary decision' to seek review of that decision by the Queensland Civil and Administrative Tribunal (**QCAT**).

'Disciplinary decision' is defined in section 167 of the Act as meaning '*a decision of the licensing committee about whether to take disciplinary action against the holder of an electrical licence or what disciplinary action to take against the holder of an electrical licence.*'

#### Submissions

The Committee argued that Whatalec's applications for judicial review should be dismissed on the basis that section 172 of the Act provides for external review by QCAT. The Committee contended that the review of a decision to take disciplinary action by QCAT under section 121(1)(b) must also entail consideration of whether the grounds for doing so existed under section 121(1)(a) of the Act. The Committee argued that an attempt to substitute judicial review for that process should not be allowed.

On the other hand, Whatalec argued that its right to seek review by QCAT under section 172 of the Act was limited to the Committee's decision as to whether and what disciplinary action should be taken (i.e. it was limited to decisions made under section 121(1)(b) of the Act). It argued that the right did not extend to review of the decision that grounds existed for taking disciplinary action under section 121(1)(a). In these circumstances, Whatalec could only obtain review of the decision made under section 121(1)(a) of the Act by way of judicial review.



## Decision

Holmes CJ dismissed Whatalec's applications for judicial review. Her Honour construed the definition of 'disciplinary decision' in section 167 of the Act as including a decision on grounds under section 121(1)(a). Holmes CJ considered that the use of 'about' in the definition is properly read as meaning 'connected with'. Therefore, a decision that grounds existed for disciplinary action is a decision 'about' whether to take disciplinary action and falls within the definition of 'disciplinary decision' under section 167 of the Act.

The proper construction of section 167 of the Act meant that Whatalec was entitled to seek review of a decision on grounds under section 121(1)(a) by QCAT. Section 13 of the *Judicial Review Act 1991* (Qld) provides that an application for statutory order of review must be dismissed if provision is made by law under which the applicant is entitled to seek a review of the matter by another court or tribunal. Consequently, Whatalec's applications for judicial review were dismissed.

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## Licensed contractors cannot challenge debts incurred under the statutory insurance scheme

### *Full Building Solutions Pty Ltd & Burt (Wyatt) v Queensland Building and Construction Commission* [2021] QDC 77

Michael Creedon | Megan Sharkey | Daniel Szabo

### Key point and significance

Licensed contractors cannot challenge the Queensland Building and Construction Commission's (QBCC's) process after it has made a payment under the home warranty insurance scheme. Although contractors may challenge directions to rectify, decisions of failure to rectify, and scoping of works through internal or external review, once the QBCC makes a payment under the insurance scheme the contractor is liable for that amount.

### Facts

Full Building Solutions Pty Ltd (FBS) carried out residential building work for a homeowner in 2017. The homeowner complained to the QBCC that the work was defective. The QBCC considered the claim under the home warranty insurance scheme in the *Queensland Building and Construction Commission Act 1991* (Qld) (QBCC Act) which protects homeowners from the cost of defective residential construction work. The QBCC inspected FBS's work and determined that the work was defective. The QBCC directed FBS to rectify the work.

FBS sought an internal review of the QBCC's direction to rectify the work. The QBCC reviewed the decision and again determined the work was defective. It then issued FBS another direction to rectify the works and notified FBS that if it wanted to have the decision reviewed, FBS could apply for external review by the Queensland Civil and Administrative Tribunal (QCAT). FBS did not rectify the works and did not seek an external review. The QBCC determined that FBS had not followed the direction.

In order to engage another contractor to rectify the building work, the QBCC:

- appointed a building consultant to invite and assess quotes;
- issued a scope of works, and sought comment from FBS;
- received a tender assessment report from the consultant;
- accepted the recommended tender offer, which was the lower of two quotes; and
- advised FBS of the amount it proposed to pay for rectification of the works prior to making the payment.

The QBCC made payments totalling \$16,017 under the home warranty insurance scheme for rectification of the building work. The QBCC then sought to recover the amount paid from FBS under section 71 of the QBCC Act and from FBS's sole director under section 111C of the QBCC Act. The QBCC brought proceedings to recover the debt in the Magistrates Court and successfully applied for summary judgment.

FBS and its sole director appealed the summary judgment decision to the District Court. They argued that they had been denied procedural fairness and attempted to challenge the QBCC's process and decisions.



## Decision

The court refused leave to appeal the decision (except for discreet grounds to correct the defective form of court order previously issued by the Acting Magistrate), upholding the summary judgment and allowing the QBCC to recover the amount paid and costs.

### Procedural fairness

The court briefly considered the argument that FBS and its sole director had been denied procedural fairness because the Magistrates Court decided the summary judgment application in their absence. It rejected this argument because FBS was served with the application and made aware of the hearing date. The opportunity to attend by audio-visual link and by telephone was also available. Consequently, the court decided that the Acting Magistrate was entitled to proceed in their absence.

### No real prospect of defending the claim?

FBS and its sole director contended that the QBCC had not followed a proper or reasonable process before making the payment which they also considered was excessive. The court said that the relevant test for summary judgment was whether the defendant had no real prospects of defending the claim, which in this case was the QBCC's debt claim under sections 71 and 111C of the QBCC Act.

### Process under section 71 of the QBCC Act

The court followed several authorities that have held that once the QBCC's debt claim reaches the Magistrates Court, it is unable to engage in merits review of the process the QBCC followed in making the payment. The QBCC has a right under section 71 of the QBCC Act to recover payments made to rectify works under the home warranty insurance scheme from the contractor that carried out the defective building works, and this right is not dependent on the reasonableness of the process followed or the amount paid out. The only question available to FBS at this point was whether the QBCC had paid out a valid claim under the scheme.

Instead, the proper forum to challenge the process was by way of an internal review or external review of any of the decisions prior to the QBCC making the insurance payout. FBS could have challenged the QBCC's processes prior to it paying out the claim by external review in the QCAT (which the QBCC had advised at the time of the internal review decision) but failed to do so. Even if FBS had trouble seeking review at the time, including because of extenuating circumstances, the court found this was not a legal basis to challenge the debt after the QBCC had incurred it.

The court held that once the QBCC had proven a valid payment under the home warranty insurance scheme, the onus of proof shifted to FBS to show that it had a valid defence or that a trial was necessary. Given FBS did not raise a valid defence or other reason for holding a trial, the court found the Acting Magistrate had applied the correct test for summary judgment and FBS had no real prospects of successfully defending the QBCC's debt claim.

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## QBCC clipped in its recovery attempt against a former director of a construction company

### Queensland Building and Construction Commission v Kooner & Ors [2021] QDC 136

Clare Turner | Allie Flack | Charlotte Lane

### Key points

If a building contractor fails to comply with a direction of the Queensland Building and Construction Commission (**QBCC**) to complete work or rectify defects, resulting in the QBCC making a payment under the home warranty insurance scheme, the QBCC will be entitled to recover that payment from the relevant building contractor.

In the event the building contractor is a company, the QBCC's right of recovery extends to the individuals who were the company's directors at the time the relevant building work was carried out or left incomplete. However, this liability does not extend to anyone who was ever a director of the company.



## Legislation

Section 71 of the *Queensland Building and Construction Commission Act 1991* (**Act**) permits the QBCC to recover from a building contractor any payment made under the QBCC home warranty insurance scheme if the payment relates to residential construction work carried out by that building contractor.

Section 111C(6) of the Act provides that when a company owes the QBCC an amount because of a payment made under the QBCC home warranty scheme, liability also attaches to each individual director of the company when the building work was carried out and when the payment was made by the QBCC.

## Facts

Kooner Constructions Pty Ltd (**Kooner Constructions**) was placed into liquidation in 2018. The first defendant, Mr Kooner, was the sole director of Kooner Constructions and between 2011 and 2012 a former director of Budget Quality Homes (**BQH**). The second and third defendants, Mr M Robertson and Mr A Robertson, were also former directors of BQH during different periods between 2012 and 2013. BQH held a building licence between 2012 and 2013, before it was deregistered in February 2014.

In December 2011, Kooner Constructions entered into a contract with the homeowners (**contract**) to perform residential construction work (**building work**). The QBCC asserted that at some point between December 2011 and August 2012 BQH *'took over the contract'* from Kooner Constructions. On 15 August 2012, BQH paid an insurance premium for the building work. The QBCC submitted that between May 2012 to February 2013, BQH carried out the building work. BQH ceased performing the building work in February 2013. The following month, the homeowners terminated the contract and lodged a complaint with the QBCC regarding incomplete building work. At this time, the third defendant was no longer a director of BQH. In May 2013, the QBCC directed BQH to complete the building work. Although BQH did not dispute the QBCC direction, it failed to undertake the rectification works. In July 2013, the QBCC paid the homeowners \$200,000 under the statutory home warranty scheme for incomplete building work.

The QBCC contended that it was entitled to recover the \$200,000 from BQH and its directors under sections 71(1) and 111C(6) of the Act. The QBCC obtained default judgement against the first and second defendants. This matter was to determine whether the QBCC could also recover from the third defendant for his time as a director of BQH.

## Issue

The key issues for determination were:

whether BQH was the relevant 'building contractor' for the purposes of section 71(1) of the Act; and

whether the third defendant was a director of BQH when the building work was or was to have been carried out and was liable for the QBCC's insurance payout pursuant to section 111C(6) of the Act.

## Decision

Jarro DCJ dismissed the QBCC's claim against the third defendant. His Honour found that although BQH was a 'building contractor' for the purposes of the Act, the third defendant was not liable pursuant to section 111C(6) of the Act.

### **BQH a 'building contractor' for the purposes of section 71(1) of the Act**

The evidence that led to the conclusion that BQH was a 'building contractor' included that:

the QBCC had issued a certificate of insurance in relation to the building work, which recorded BQH as the contractor and noted BQH's licence number; and

BQH issued construction documents for the building work.

Jarro DCJ agreed with the third defendant's proposition that the QBCC's contention that BQH had *'taken over'* the building work from Kooner Constructions was an obstacle in its case, as there was no evidence to support this proposition. However, his Honour was of the view that the evidence had sufficiently demonstrated that there were a number of building contractors involved in the building work, namely Kooner Constructions, the second defendant and BQH. BQH's exposure to liability arose in circumstances where it was not contested that between August and September 2012 BQH did or was to perform the building work. It was also accepted by the parties that BQH held a building licence from the QBCC from August 2012. Furthermore, the certificate of insurance which was issued in October 2012 identified the risk commencement period from 15 August 2012. Jarro DCJ concluded that the QBCC was entitled to recover



payment, as a debt, from Kooner Constructions, the second defendant, or BQH. The QBCC elected to recover payment from BQH.

### Third defendant not liable pursuant to section 111C(6) of the Act

As BQH was a building contractor for the purposes of section 71(1) of the Act, the court was required to consider whether, pursuant to section 111C(6) of the Act, the third defendant was liable to pay the rectification costs because he was a director of BQH when the building work was carried out. His Honour noted that the purpose of this legislative provision is aimed at making directors personally liable for defective or incomplete works when that work is either carried out or meant to be completed. His Honour was not persuaded that the building work, which ultimately led to the insurance pay out by the QBCC, related to work performed at a time when the third defendant was a director of BQH. Instead, the failure to complete the building works arose after the third defendant's resignation as a director of BQH. Jarro DCJ did not accept the QBCC's submission that any person who was ever a director whilst any building work under a contract is undertaken is strictly liable under section 111C(6) of the Act, finding that such a construction of the legislation would exceed the objective of the Act.

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## To what extent can an expert witness rely on information produced by a third party?

### *Re Earlturn Pty Ltd* [2021] QSC 137

*Julie Whitehead | Amy Dunphy | Charlotte Lane*

#### Key points

This decision demonstrates the difficulty experts can encounter if they rely upon data that could be considered hearsay. If an expert witness relies upon third party data, the expert must demonstrate that reliance on that data is within the expert's field of specialised knowledge. Failure to do so may render an expert's evidence inadmissible.

#### Facts

During an application to wind up a company, an objection was made as to the admissibility of an affidavit of a forensic accountant, Mr John Goggin. Mr Goggin's affidavit set out two conclusions.

First, Mr Goggin concluded that Earlturn Pty Ltd's (**Earlturn**) wages and salary were significantly higher than industry benchmarks. In reaching this conclusion, Mr Goggin relied on the IBIS World Industry Report H4404 titled *Serviced Apartments in Australia (IBIS Report)*. The IBIS Report referred to various statistics and identified as a percentage the ratio of wages to revenue in the industry of operating serviced apartments during the years relevant to the dispute.

Second, Mr Goggin concluded three people were paid salaries higher than industry benchmarks. This conclusion was premised on two things, Mr Goggin's:

financial analysis of the company's salary payments; and

extrapolation of an hourly rate from an internet data source called Payscale.com (**Payscale.com information**).

The issue before the Supreme Court was whether Mr Goggin's report, which relied on information that was hearsay in nature, namely the IBIS Report and the Payscale.com information (**data**), was admissible. CK Ma Investments Pty Ltd, being the second respondent in the matter, argued that the data should not form the basis of Mr Goggin's expert opinion, because it would mean that the opinion was based upon inadmissible evidence. The court had to consider whether the data, being information authored by others, was within Mr Goggin's field of expertise.

#### Decision

The court struck out certain parts of Mr Goggin's affidavit that relied on the Payscale.com information but did not strike out the parts of the affidavit which relied upon data in the IBIS Report.



In reaching this decision, Henry J was required to consider Mr Goggin's expertise in adopting the data. Henry J discussed the 'basis rule'. The basis rule provides that a failure to demonstrate that an opinion expressed by a witness is based on the witness's specialised knowledge based on training, study or experience is a matter that goes to the admissibility of the evidence, not its weight. His Honour noted that one way around the basis rule is the taking of judicial notice of well-known, reliable data sources, such as data from the Australian Bureau of Statistics. However, this exception did not apply in this situation. Henry J then considered a second potential path around the basis rule, being that the data is part of the expert's professional field of learning and experience, drawn from resources known to and considered reliable by those who are experts in that professional field. Henry J noted that this pathway can lead to difficulties, as it may sometimes be accepted that some degree of divergence in the fields of expertise as between an expert witness and the source author will not necessarily render evidence inadmissible.

Henry J opined that it was necessary to consider whether Mr Goggin's expertise equipped him to know the reliability of the IBIS Report and Payscale.com information. Henry J found that this factor was present in relation to the IBIS Report but not present at all in respect to the Payscale.com information.

Mr Goggin's reliance on the IBIS Report and the Payscale.com information appeared to be within his expertise. Henry J opined that Mr Goggin's knowledge and understanding of data of the kind in question in this case would be integral to his application of his expertise to the topic of the financial health of companies and would equip him to comprehend it and assess its reliability and the trustworthiness of its source in a way '*readily distinguishable from mere lay reliance on a publication*'. Mr Goggin described the IBIS reports as industry benchmark reports commonly used, not merely by him, but by other forensic accountants. Henry J inferred on the balance of probabilities, from Mr Goggin's reference to the use of IBIS reports by his fellow professionals, that those in his field sanction the trustworthiness of reports such as the IBIS Report. This was in direct comparison to the Payscale.com information, which Mr Goggin was unaware of being used by others in his field.

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## SOUTH AUSTRALIA

### Contractual right to rectify defects – the contractual procedure is supreme

#### *Bedrock Construction and Development Pty Ltd v Crea* [2021] SASCA 66

Jeanette Barbaro | Maisie Hull | Courtenay Wood

#### Key point

As between the parties to a construction contract, if the contract gives the builder the right and obligation to rectify defects before the owner can engage a third party to carry out the rectification works, the owner must give the builder the opportunity to do as provided in the contract and must give the builder access to the building. Where a builder is able and willing to undertake the rectification works, an owner cannot refuse to grant the builder access, even if relations have broken down. Where the contract so provides, the failure to give the builder the opportunity to rectify in accordance with the contract will reduce (but not extinguish) the damages that the owner can seek from the builder, having undertaken the works itself.

#### Facts

Bedrock Construction and Development Pty Ltd (**builder**) was engaged by Mr Anthony Crea (**owner**) to undertake renovation and fit out works at the owner's pizzeria restaurant. The contract contained a clause M11 which provided:

*'The contractor must correct any defects or finalise any incomplete works necessary work, whether before or after the date of practical completion, within the agreed time as stated in an instruction or if no time is stated, within 10 working days after receiving a written instruction from the architect to do so.'*

If the builder failed to rectify the defects in accordance with the instruction, clause M12 allowed the owner to engage another person to rectify the defects at the builder's cost.



The superintendent issued three revisions of a defects lists to Bedrock pursuant to clause M11 on 12 April 2016, 20 April 2016 and 13 May 2016.

On 22 April 2016, the owner took possession of the site and commenced operating the restaurant (which under the contract meant the works had reached practical completion). During the defects liability period that followed, Bedrock was provided access to the site to rectify the defects on only two days from this date (far less than the 10 working days as required under the contract). The relationship between the builder and the owner deteriorated, and on 11 May 2016 the owner informed the builder to refrain from undertaking any further works. The builder had no further access to the site after those two days.

In March 2017, the owner commenced proceedings against the builder seeking damages in respect of defects and incomplete works. The builder cross-claimed seeking payment of its final progress claim.

The trial judge found that, despite the builder being willing to come back to the site, the builder had not been given 10 working days to rectify defects. Despite this, the court held that the refusal to provide 10 working days' access was reasonable on the basis:

that the relationship between the owner and the builder had become unworkable; and  
of the number of defects, the owner had lost faith in the ability of the builder to complete the works.  
The builder appealed to the Supreme Court of Appeal.

### Decision

The court allowed the builder's appeal. The court held that the trial judge erred in approaching the owner's claim for damages on the basis that the owner had given the builder a 'reasonable' opportunity to rectify the defects.

The owner did not afford the builder 10 working days' access to the site to rectify the defects in accordance with its contractual right under clause M11.

The court held that clause M12, when read in conjunction with M11, gave the builder a right to a period of 10 working days to undertake rectification work. Where the builder was willing and able to undertake the works, the court refused to recognise that there can be any reasonable basis for the owner not permitting the builder access, even where relations had broken down. As the owner had refused to provide access for the full 10 working days' contractual entitlement, the damages payable by the builder to the owner were reduced by \$35,000 referable to those items of work which could have been rectified by the builder at cost, had it been given access.

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## VICTORIA

### Limitation period determined by the occupancy permit which 'best reflects' the whole of the work

#### *Lendlease Engineering Pty Ltd v Owners Corporation No.1 & Ors [2021] VSC 338*

*Jeanette Barbaro | Tom Kearney | Courtenay Wood*

#### Key points

Where more than one occupancy permit has been issued for a staged development, the limitation period commences on the date of the final occupancy permit for the whole of the building work.

Individual owners cannot be joined to a proceeding commenced by an owners corporation after the limitation period has expired.

#### Facts

Lendlease Engineering Pty Ltd (**contractor**) undertook building work at the Chevron apartment complex. The building work was delivered in four separable portions and four occupancy permits were issued. The





building work included the construction of louvered metal shade screens to the exterior of the building perimeter located in both the common property and private apartments.

On 13 February 2017, Owners Corporation No. 1 PS526704E (**owners corporation**) commenced proceedings in the Victorian Civil and Administrative Appeals Tribunal (**VCAT**) alleging defects in louvered metal shades. The contractor made an application to dismiss the proceeding on the basis that: the owners corporation could not bring a claim regarding allegedly defective louvres on private lots; and some claims had been brought more than 10 years after the relevant occupancy permit was issued.

Section 134 of the *Building Act 1993* (Vic) (**Act**) provides that a building action cannot be brought more than 10 years after the date of issue of the occupancy permit in respect of the building work.

There were two occupancy permits, dated 6 December 2006 and 16 February 2007, which related to the alleged defective works.

The owners corporation submitted that the limitation period commenced from the date of issue of the last occupancy permit, being 16 February 2007. The contractor argued the limitation period commenced on the date of the first occupancy permit, being 6 December 2006. VCAT agreed with the owners corporation and found that the claims were not time-barred.

In October 2019 the owners corporation made an application to join 137 private lot owners to address the issue that it could not bring claims for defects on private apartments. Although the limitation period had expired, VCAT allowed the joinder on the basis that the owners corporation had commenced proceedings on behalf of the individual private lot owners. The contractor appealed to the Supreme Court.

## Decision

### Commencement of limitation period

Forbes J dismissed the appeal on the limitation question.

Forbes J held the occupancy permit or certificate of final inspection that certifies the whole of the building work will be the operative permit for determining when the limitation period commences. Therefore, the limitation period commenced on 16 February 2007. The language of the Act makes a distinction between 'an' and 'the' occupancy permit. Forbes J found that the reference to 'the' occupancy permit in section 134 is a reference to the occupancy permit that best reflects the whole of the work in the building.

### Joinder

Forbes J allowed the appeal on the question of joinder.

First, Forbes J found that it would be erroneous to conclude that VCAT has the power to join a new party after the expiry of the time period by application of its own procedural powers to act fairly. Second, notwithstanding the expiry of the limitation period, Forbes J held that there was no factual evidence open to VCAT to allow it to conclude the owners corporation was acting on behalf of the private lot owners in commencing proceedings.

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## WESTERN AUSTRALIA

### No appeal available against adverse arbitral decision

#### *Venetian Nominees Pty Ltd v Weatherford Australia Pty Ltd* [2021] WASC 137

Tom French | Candice Lamb | Ljubica Petrovic

### Significance

Parties to a contract should be aware of the far-reaching consequences of an arbitration clause. Unless the parties have agreed otherwise, arbitral determinations made under the *Commercial Arbitration Act 2012* (WA) (**Act**) are final and binding, and the losing party does not thereafter get a second chance to argue its case by appeal to the courts. Applications to set aside arbitral awards can only be made on extremely



limited and procedural grounds under section 34(2) of the Act, and any party which unsuccessfully attempts to dress up a de-facto appeal to look like a procedural grievance may be met with a punitive costs sanction.

## Facts

Venetian Nominees Pty Ltd (**lessor**) leased out commercial premises in Malaga to Weatherford Australia Pty Ltd (**lessee**). Under the lease agreement, the lessee was required to contribute to the lessor's outgoings an amount calculated by reference to the total lettable area of the lessor's land (which encompassed numerous other leased commercial premises). At the time the lease was entered into, the lessee's premises only constituted 11% of the total lettable area.

A dispute arose when the lessor claimed that the term '*total lettable area*' excluded certain areas (including undeveloped land, and land used for car parking, access and driveways) which consequently increased the proportion of the lessor's outgoings that could be charged to the lessee. The lessee claimed that this was not the proper interpretation of '*total lettable area*' and sought a refund of the overpayment.

The parties agreed to take the dispute to a private arbitration conducted under the Act. The arbitrator found in favour of the lessee and determined that the lessee was entitled to deduct the overpaid amount from future payment to the lessor.

The lessor appealed to the Supreme Court of Western Australia to have the arbitrator's determination set aside under section 34(2)(a)(ii) and (iv) of the Act on the basis that the lessor was unable to present its case in the arbitration and that the arbitrator failed to afford procedural fairness to the lessor. For example, the lessor claimed that it could have led expert evidence if it had been given proper notice of the arbitrator's conclusion about how common areas in a lease are designated.

## Decision

Martin J dismissed the lessor's argument, finding that the lessor had ample opportunity to present its case and there was no procedural unfairness pursuant to section 34(2)(a)(ii) and (iv) of the Act.

However, the significance of this decision lies not with his Honour's analysis of whether the lessor has established the grounds for appeal, but rather with his Honour's affirmation that the purpose of arbitration is to provide a quick, relatively inexpensive and final medium for private dispute resolution, and that appeals of arbitral determinations cannot be made merely because the losing party wants a second chance to argue its case.

Evident throughout the decision is Martin J's frustration with the all-too-common appeals against non-appealable arbitral determinations. Section 34(2) of the Act provides extremely limited grounds for appeal and all those grounds relate to procedural (not substance) issues. However, *'too many unsuccessful arbitration participants still see it as worth their while to "roll the dice" by manufacturing a pathway to a court, where strained procedural unfairness arguments rise to the fore as something of a last refuge of the desperate'*.

In the present case, Martin J was extremely critical of the lessor's appeal which his Honour considered was *'truly breathtaking in its audacity'* and not a procedural grievance but rather *'just a badly run case'*. His Honour plainly expressed that, *'despite the many layers of lipstick, the essential nature of [the lessor's] grievance is ultimately exposed to being that its advocated rival interpretation of the [meaning of "total lettable area"] was rejected by the arbitrator. Such a grievance is not a true process grievance. It is a poorly disguised attempted appeal raised against a decision reached against it. Save to say, losing is not a violation of procedural fairness principles'*.

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# Contributing partners

Email [firstname.lastname@minterellison.com](mailto:firstname.lastname@minterellison.com)



**Andrew Hales**

Partner

**T** +61 2 9921 8708

**M** +61 470 315 319



**Andrew Orford**

Partner

**T** +61 7 3119 6404

**M** +61 400 784 981



**Michael Creedon**

Partner

**T** +61 7 3119 6146

**M** +61 402 453 199



**Clare Turner**

Special Counsel

**T** +61 7 3119 6567

**M** +61 413 232 682



**Julie Whitehead**

Partner

**T** +61 7 3119 6335

**M** +61 422 000 320



**Jeanette Barbaro**

Partner

**T** +61 3 8608 2515

**M** +61 413 427 265



**Tom French**

Partner

**T** +61 8 6189 7860

**M** +61 423 440 888

**Construction Law Update editor**

Sophie Wallwork (Sydney)

**T** +61 2 9921 4039

ME\_187406576