

InfoPAKSM

Construction and Projects Guide: Australia

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Construction and Projects Guide: Australia

March 2016

Provided by the Association of Corporate Counsel
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This InfoPAKSM provides a Q&A that gives a high level overview of the main trends and significant deals; procurement arrangements; transaction structures and corporate vehicles; financing projects; security and contractual protections that funders require; standard forms of contracts; risk allocation; excluding liability, including caps and force majeure; contractual provisions covering material delays and variations; appointing and paying contractors; subcontractors; licences and consents; projects insurance; employment laws; health and safety; environmental issues; corrupt business practices and bribery; bankruptcy/insolvency; public private partnerships (PPPs); dispute resolution; tax and mitigating tax liability; the main construction organisations; and proposals for reform.

To compare answers across multiple jurisdictions, visit the construction and projects Country Q&A tool at <http://uk.practicallaw.com/4-502-1260>.

This Q&A is part of the global guide to construction and projects law. For a full list of jurisdictional Q&As visit www.practicallaw.com/construction-guide.

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I. Overview of the Construction and Projects Sector

A. What Are the Main Trends in the Local Construction and Projects Market? What Are the Most Significant Deals?

I. Main Trends

Construction activity in major infrastructure projects in Australia remains generally strong. There are, however, contrasting levels of activity across the Australian states. New South Wales (NSW) is in a state of boom with heightened major transport infrastructure and residential project activity fuelled respectively by infrastructure-focused government policy and investor demand for residential property. Other states, such as Queensland (QLD) and Western Australia (WA), are experiencing decreased amounts of activity due to the decreases in mining activity and an under-performing residential property market in those states. The somewhat unexpected election result in Queensland, together with the incoming government's election-winning promise to abandon proposed government asset sales, will likely further dampen the QLD market with many proposed QLD-based projects now facing funding issues. The Victorian market has remained steady. It has, however, been affected by the abandonment of the East-West Link Project.

The mining sector in Australia remains generally slow with supply currently outweighing demand in a number of sectors. This has resulted in mining companies cutting back on supply to adjust to market demand and placing proposed expansion projects on hold. The commercial and retail building market in Australia is still underperforming when compared to the residential market. The sector has, however, bounced back with some large scale projects such as Barangaroo and the Darling Harbour redevelopment in NSW (*see Section I.A.2*). A key challenge for the Australian retail and commercial building market in the near to long term future is the increasing trend for companies to move their businesses online.

The rail sector is experiencing very strong activity with the NSW, ACT and QLD governments all engaging in major light and heavy rail development and expansion projects.

In terms of procurement methods, there appears to be a shift away from "relationship contracting" models (such as alliances) and toward more traditional forms of construction procurement such as "hard dollar" contracts and time contracts. While construction and infrastructure activity in many states of Australia is resilient, the competition among companies for that work remains fierce. Public-private partnerships (PPPs) remain a

popular choice for the delivery of major infrastructure projects. In line with the National PPP Policy, the federal, state and territory governments will consider a PPP for any project with a capital cost in excess of A\$50 million.

2. Major Projects

Some of the major Australian projects are listed below:

- **Barangaroo (NSW)** . A major urban renewal project involving a 22 hectare, A\$6 billion precinct on the western edge of Sydney Harbour.
- **Sydney Light Rail PPP Project (NSW)** . The contract to design, construct, operate and maintain the Cornerstone building development (CBD) and South East Light Rail project was signed in December 2014 and is currently under construction.
- **Capital Metro Light Rail PPP Project (Australian Capital Territory (ACT))** . This project involves the design, construction, operation and maintenance of a light rail in the ACT. The project has just progressed to request for proposal stage with two consortiums recently shortlisted to bid.
- **WestConnex Road Project (NSW)** . WestConnex is Australia's biggest urban road project and will be delivered in three stages over ten years. The final stage (stage 3) is due to open in 2023.
- **NorthConnex (NSW)** . The NSW and Federal Government, Transurban and the M7 Westlink shareholders (the project sponsors) are planning to build, operate and maintain a nine kilometre tunnel tolled motorway linking the M1 Pacific Motorway at Wahroonga to the Hills M2 Motorway at West Pennant Hills.
- **Forrestfield-Airport Link Project (WA)** . A proposed A\$2 billion project that will open up a new rail corridor to Perth's eastern suburbs, as well as connecting the rest of the city to the airport.
- **Level crossing removals (Victoria (VIC))** . Over the next eight years 50 level crossings will be removed. Planning is underway and construction will begin this year, with the first 20 crossings to be removed over the next four years.
- **North West Rail Link (NSW)**. The project includes construction of Australia's longest rail tunnels. The contract was awarded in late June 2013. Full construction commenced in May 2015 and is expected to be completed by 2019.
- **Sydney Rapid Transit (NSW)** . The proposed new rail network is in development. Procurement of the construction contracts is to take place by 2019, and building and commissioning of the network is to be completed by 2024.
- **Melbourne Metro (VIC)**. The Victorian Government recently announced the establishment of the Melbourne Metro Rail Authority. Project consultation and a business case update have commenced. An expression of interest will be released in 2016 with major works expected to commence by 2018.

- **Gold Coast Rapid Transit Stage 2 (QLD).** Stage 1 of the light rail project opened in mid-2014 comprising a network extending 13km connecting the Gold Coast Health and Knowledge Precinct at Parklands with Southport, Surfers Paradise and Broadbeach. Stage 2, which proposes to extend the existing network, is in planning stages.
- **Toowoomba Second Range Crossing (QLD).** Currently still in procurement phase, the construction period of this significant A\$1.6 billion road crossing is expected to occur by late 2018.

II. Procurement Arrangements

A. Which Are the Most Common Procurement Arrangements If the Main Parties Are Local? Are These Arrangements Different If Some or All of the Main Parties Are International Contractors or Consultants?

The typical matrices for Australian major projects include:

- Traditional "construct-only" contracts.
- Design and construct contracts.
- Engineering, procurement and construction (EPC) contracts.
- Engineering, procurement and construction management (EPCM) contracts.
- Guaranteed maximum price (GMP) contracts.

The most common public-private partnership procurement arrangements are design construct and maintain (DCM) and build-operate-transfer (BOT) style contracts.

Each project delivery structure has advantages and disadvantages and will vary from project to project depending on the owner's objectives and the nature and complexity of the project. Although owners can contract with contractors through construction managers, it is more common for owners to contract directly with the contractor. The contractor, in turn, usually subcontracts the majority of the physical work to trade subcontractors.

The Australian market is seeing a significant increase in the number of international contractors operating in Australia across various infrastructure sectors, including major

transport infrastructure projects such as Toowoomba's Second Range Crossing Project, where two of the three shortlisted consortiums have a strong international make-up.

There are no significant differences between the types of procurement arrangements used for international and local parties. However, at a consortium level, however, international contractors, particularly those who contribute project technology, prefer horizontal consortium arrangements predicated on split scope, reward and liability, as opposed to the more traditional integrated joint venture approach used by Australian contractors.

III. Transaction Structures

A. What Transaction Structures and Corporate Vehicles Are Most Commonly Used in Both Local and International Projects?

I. Local Projects

In Australia, contractors tend to bid for projects either in their own corporate capacity as a company or in a joint venture (JV) with other contractors, designers or technology providers. There are various reasons why contractors may decide on a JV on particular projects, including to:

- Draw on the skillset and expertise of the parties.
- Share and lower costs of bid and delivery.
- Share and lower risks as between themselves because clients will almost always insist on a joint and several liability contracting arrangement with the JV.
- Improve financial strength.
- Ensure related entities do not bid against one another.
- Build a brand and a track-record.

JVs can be incorporated and unincorporated.

Incorporated. Each JV takes a shareholding in a company specifically incorporated for the project.

Unincorporated. Each JV is a purely contractual relationship governed by the terms of the JV agreement. An unincorporated JV is not a separate legal entity, separate from the parties to the JV. Participants in unincorporated JVs can lodge separate tax returns for their portions of the project and adopt different tax treatments for income and expenses. JV participants should get specific legal advice in order to minimise the risk that the Australian Tax Office could consider the JV to be a partnership at law or for taxation purposes.

There is no strict legal requirement that a local contractor control the JV. However, foreign investment in incorporated JVs can be examined by the Treasurer and the Foreign Investment Review Board under the Foreign Acquisitions and Takeovers Act 1974 if a foreign person is to obtain:

- A substantial or controlling interest (15% by an individual, or 40% where two or more persons act together) in an Australian company with total assets valued in excess of A\$252 million or A\$1094 million for prescribed foreign investors in non-sensitive sectors.
- An interest in an Australian urban land, not used for primary production, excluding leases or licences under five years.

2. International Projects

There are no significant differences between the types of procurement arrangements used for international and local parties.

IV. Finance

A. How Are Projects Financed? How Do Arrangements Differ for Major International Projects?

Projects can be government-funded or financed through debt and equity. Mezzanine finance is also sometimes used in larger projects. This can be through second-ranking security at all levels in the project or through a structurally subordinated debt piece at the holding company level.

The bond market for infrastructure projects with stable cash flows has started to grow again, after its decline in the immediate aftermath of the global financial crisis. For larger projects, particularly in the resources sector and where there is an international element, the use of export credit agencies (ECAs) and development finance institutions (DFIs) is quite common. ECAs and DFIs provide government backed-loans, bonds, guarantees and

insurance to corporations that are looking to do business overseas. In addition, DFIs can assist in making riskier projects more profitable. Most senior debt is provided by the major Australian and international banks. Other entities such as ECAs, DFIs and superannuation funds have also provided senior debt finance in syndicates with commercial bank lenders.

Debt finance is generally secured over project assets. However, on riskier projects, some level of limited recourse to sponsor support may be required, particularly to ensure sponsor equity is ultimately contributed where not all equity is contributed at the outset of the project. It is also common to see key project documents subjected to a direct agreement between the sponsor or the project entity, the material project document counterparty and the financiers. Such documents include:

- EPC contracts.
- Operation and maintenance agreements.
- Off-take agreements.
- Landholder agreements.
- Government concession agreements.

These agreements aim to:

- Reduce the risk of key project documents being terminated in the event of the sponsor's or project entity's default or insolvency.
- Increase the likelihood that financiers can enforce their security and sell the project in its entirety, with all major project documents remaining in place so the project can continue to operate.

V. Security and Contractual Protections

A. What Forms of Security and Contractual Protections Do Funders Typically Require to Protect Their Investments?

I. Security

It is typical for funders in Australian projects to require the contractor to provide various forms of security to secure the performance of its obligations under its construction contract, including:

- The provision of unconditional bonds for a certain percentage of the contract price (a range of 5% to 10% of the contract price is typical). The bonds usually need to be procured from a reputable bank or insurer with an approved credit rating and will be proportionately reduced over the construction and defects correction period.
- A parent company guarantee from a parent to guarantee the performance of its subsidiary.

Where international contractors are involved in a project, funders will typically insist upon an enforceability advice in respect of a parent company guarantee where the parent entity has been created outside of Australia. Furthermore, where international contractors have bonding relationships with international banks, funders will insist that those banks have sufficient credit standing and provide bonds which allow them to be called in branches in Australia.

2. Contractual Protections

In order for a construction contract to be bankable, funders will also insist upon certain contractual provisions including:

- Delay liquidated damages and "look-forward" default regimes to safeguard against the risk of delay.
- Performance guarantees and performance liquidated damages regimes to ensure the output reliability of an asset.
- Tight restrictions on the ability of a contractor to terminate the contract.

In project financed projects, funders will also require the contractor to enter into a debt finance side deed pursuant to which the funders will have certain rights including to step into the shoes of the principal in the event of the principal's default or insolvency to ensure the project can continue.

If a funder is entering into a contract as a secured party, the funder will also want to register its interest on the Personal Property Securities Register (PPSR). The PPSR came into operation on 30 January 2012, under the Personal Properties Securities Act 2009, superseding many previous Commonwealth, state and territory laws and registers for particular types of personal property. Registration occurs when a secured party completes a "financing statement" online via the PPSR website. There is no requirement for grantors to consent to the registration of a security interest, so long as the actual security interest exists. The party granting the security interest is not required to take any further steps beyond the security agreement.

VI. Standard Forms of Contracts

A. What Standard Forms of Contracts Are Used for Both Local and International Projects? Which Organisations Publish Them?

I. Local Projects

Standard contract forms regularly used in Australia for local and international construction and design include:

- Contracts developed by Standards Australia, such as contracts for design and construct, construct only, asset maintenance, equipment supply and tender documentation. Standards Australia regularly issues new versions and suites of contract documents. For example, it has recently issued a new draft General Conditions of Contract known as AS 11000.
- The Australian Building Industry Contracts (ABIC) suite of building contracts, jointly drafted by Master Builders Australia and the Australian Institute of Architects are intended for use where an architect administers a contract which includes the ABIC MW-2008 Major Works Contract.
- The Australian Defence Contracting Suite of Tendering and Contracting templates (AUSDEFCON templates) used for defence contracts.
- The GC21 form of government contracts used by a number of state governments and state-owned corporations.

Australia has made some advances in the domain of alliance contracting with the Council of Australian Governments Infrastructure Working Group developing the National Alliance Contracting Policy and Guidelines in 2011. These national guidelines stand as a framework for a more consistent and streamlined delivery of large public sector infrastructure alliance contract projects across Australia. In the domain of alliancing, the Alliancing Association of Australasia (AAA) acts as a private independent forum for the promotion and sharing of alliancing best practice across the infrastructure industry. The AAA aims to encourage and develop the benefits of collaborative contracting to public and private infrastructure organisations working in an alliance to deliver enhanced project outcomes. The AAA has published a standard form of project application and management of collaborative business engagements in the delivery of public, commercial, industrial and special infrastructure projects and services. Parties must familiarise themselves with the implications of the "no-dispute" type provisions that have become standard in project alliances in Australia.

2. International Projects

Generally, there are no mandatory forms of contract that must be used for international and local projects. Occasionally, modified International Federation of Consulting Engineers (FIDIC) contracts are used for projects with international components. Among its numerous standard forms is the "Gold Book" for Design, Build and Operate projects. The Gold Book contract is intended for situations where the owner of a project wishes the entity that designed and constructed a facility to continue to operate and maintain that facility for a number of years.

VII. Contractual Issues

A. Contractors' Risks

I. What Risks Are Typically Allocated to the Contractor? How Are These Risks Offset or Managed?

The risks allocated to a contractor will be determined on a project-by-project basis taking into account:

- The nature of the particular project.
- The scope of work being performed by the contractor.
- The particular risks associated with a particular project.

A contractor will attempt to mitigate risks that it is required to accept through a combination of due diligence and price and time contingencies.

Generally, on a lump sum engineer, procure and construct contract, a contractor will be expected to take risks associated with certain approvals, fitness for purpose of the design and the works, site conditions, delay (except for a finite list of extension of time events including force majeure) and facility performance. A principal will typically retain key planning and environmental approvals risks, existing structures risk and third party legal challenge risk.

In a PPP context, the Australian Government has the National PPP Policy Framework which is intended to establish a best-practice consistent approach to PPP delivery. The Framework includes commercial principles for social and economic infrastructure projects. These commercial principles can be accessed on Infrastructure Australia's official website www.infrastructureaustralia.gov.au/public_private/ppp_policy_guidelines.aspx.

VIII. Excluding Liability

A. How Can Liability Be Excluded or Restricted under Local Law?

There are certain liabilities and duties that cannot be excluded, limited or delegated by contract, including:

- Unlimited liability.
- Certain occupational liability.
- Health and safety duties.
- Liability for criminal or fraudulent conduct.

Proportionate liability legislation varies from state to state. In some states, parties can contract out of the legislation. For example, New South Wales, Western Australia and Tasmania allow parties to contract out, while in Queensland contracting out is strictly prohibited.

Aside from non-delegable duties and liabilities at law, parties can limit and exclude liability in the contract (*see Section IX.A*).

IX. Caps on Liability

A. Do the Parties Usually Agree a Cap on Liability? If Yes, How Is This Usually Fixed? What Liabilities, If Any, Are Typically Not Capped?

In the Australian market it is extremely common for parties to agree to an overall limitation on the contractor's liability subject to some market-standard exclusions. The amount of the liability cap, together with the nature and extent of the carve-outs, is a negotiated position driven largely by the parties' differing bargaining power.

However, as a guide, liability cap amounts tend to range from 50% to 100% of the relevant contract price with the following carve-outs:

- Liability for any wilful default or fraudulent act or omission.
- Liability for third party property damage or personal injury or death.
- Liability for which insurance proceeds are received or would have been received but for the act or omission of the relevant party.
- Liability for infringement of third party intellectual property rights.
- Liability for breach of confidentiality.

Where a contractor is liable under a contract for liquidated damages, it is also common for the parties to agree a sub-cap on the contractor's liability for those liquidated damages.

It is also common for parties to exclude liability for indirect and consequential loss, except for certain agreed exclusions. These exclusions generally mirror those that are carved-out from the overall liability cap. However, it is necessary to exclude any agreed liquidated damages from this exclusion as those liquidated damage amounts will almost always have, in their calculation, elements of loss that would otherwise be classified as indirect and consequential loss.

Where a contractor in a project-financed deal goes over its delay liquidated damages or overall liability cap by a certain percentage, this will be considered a default event.

X. Force Majeure

A. Are Force Majeure Exclusions Available and Enforceable?

Force majeure, a civil law concept, has no real meaning in Australian common law. However, force majeure clauses are sometimes used in Australian contracts because the only similar common law concept, the doctrine of frustration, is of limited application. For frustration to occur, the performance of a contract must become radically different from what was intended by the parties. Whether a contract has been "frustrated" depends on the terms of the contract and the circumstances of the particular case. Most contractors seek to include an express force majeure clause, or a similar excepted risks clause, to relieve them from contractual obligations in the case of events outside of their control. Under some standard form contracts, the contractor is entitled to an extension of time if completion is delayed by events beyond its control.

XI. Material Delays

A. What Contractual Provisions Are Typically Negotiated to Cover Material Delays to the Project?

Most construction contracts impose a hard-time obligation on the contractor to achieve completion by a particular date.

A liquidated damages clause is the most commonly used provision to account for damages caused by inexcusable delays in a project beyond the completion date. Inexcusable delays generally include contractor-caused delays and delays caused by risks that the contractor has otherwise accepted under the contract.

Liquidated damages provisions in Australian contracts are standard and are enforceable provided they are calculated as a genuine pre-estimate of the relevant loss. The liquidated damages will either be paid to, or deducted by, the employer at a pre-agreed weekly or daily rate. The damages will continue to be payable until the works are completed or a particular sub-cap on liability has been reached.

Construction contracts generally include extension of time regimes that allow the contractor an extension of time for certain delay events. Such delay events generally include:

- Delays caused by the principal or risks that the principal has accepted under the contract, such as delays to main planning approvals.
- Delays caused by neutral events, such as changes in law or force majeure events.
- Delay cost provisions are also included to provide a contractor with delay costs for certain extension of time events. A contractor will generally be entitled to delay costs, often capped at an amount per day, for principal-caused delays and delays related to risks that the principal has accepted under the contract. A contractor is not usually paid delay costs for delays caused by neutral delays.

XII. Material Variations

A. What Contractual Provisions Are Typically Negotiated to Cover Variations to the Works?

Most construction contracts contain express provisions giving the superintendent, the principal or both the entitlement to direct variations. Most standard form contracts define

"variation" broadly to give the superintendent flexibility as to what the contractor may be directed to perform. This can include any change to the works including any addition, increase, decrease, omission, deletion, demolition or removal to or from the works. However, there are certain laws that restrict the principal's right to direct variations. A principal cannot exercise its variations power to fundamentally alter the scope of the works. In addition, the principal's right to omit works and give those to other contractors must be expressly and clearly stated in the contract.

The following are taken into account when calculating the payment for variations:

- The agreement.
- Any prescribed rates or prices to the extent that it is reasonable to use them.
- Any reasonable rates or prices determined by the superintendent.
- Any day work rates.

A contractor is typically entitled to an additional percentage on account of costs to recover its preliminary and margin costs.

XIII. Other Negotiated Provisions

A. What Other Contractual Provisions Are Usually Heavily Negotiated by the Parties?

I. Security-Related Provisions

Those relate to:

- The form of security bonds.
- The right of the principal to call on those bonds.
- The requirement to replace bonds in the event of a fall in credit rating of the security provider.

2. Payment Terms

Those relate to the payment profile, as contractors are increasingly focused on the need to remain cash flow positive. They require initial advanced payments to ensure the profile achieves this.

3. Fitness for Purpose Warranties

Those related to the nature, scope and timing of these warranties.

4. Information Documents

Those relate to:

- The nature of the information that parties can rely on.
- The consequential relief in the case of errors, omissions, discrepancies or inaccuracies.

5. Design Development Process

Those relate to:

- Timings for review.
- The right of the contractor to proceed at its own risk in the event of dispute over design documentation comments.

6. Access Provisions and Delays Caused by Other Contractors

Those are generally negotiated in multi-prime sites.

7. Risk and Relief for Unexpected Site Condition

Those relate to time and any delay cost relief for unexpected site conditions.

8. Provision of Third Party Warranties

Those relate to:

- The nature of the obligation to procure these warranties, such as an absolute obligation or best endeavours obligation.

- The form of these warranties, whether prescribed or in the form of what is commercially available only.

9. Role of the Principal's Representative

Those relate to the requirement for a principal's representative to act fairly, reasonably and impartially in the assessment of certain functions.

10. Indemnities

Those relate to the subject matter, breadth and number of indemnities.

11. Completion

Those relate to:

- The test for completion.
- Whether completion needs to be "defect-free".
- The nature of any conditions precedent to completion.

12. Time Bars

Those relate to:

- The trigger for these time bars, such as actual or objective notice.
- Timings of time bars.

13. Assignment and Change in Control

Those relate to restrictions around assignment and change in control.

XIV. Architects, Engineers and Construction Professionals

A. How Are Construction Professionals Usually Selected? Following Selection, How Are They Then Formally Appointed?

Construction professionals such as architects and engineers are usually engaged by a consultancy or professional services agreement. There are several standard form professional services agreements. However, many contractors have their own form of bespoke professional services agreement that they use to negotiate and engage professional service providers. There is also an Australian Standard (AS 4122-2010) consultancy agreement which provides for a risk allocation favourable to consultants.

During a tender phase, it is also common for consultants to be engaged under a separate teaming or pre-bid tender services agreement that governs the provision of services during the tender period. During the tender period, the parties agree on a full-form professional services agreement to govern the delivery of the project after the award.

On large government projects and tenders, probity often dictates that only certain consultants can be used by certain parties. For example, if consultant A has been engaged by the government, and consultants B and C have been engaged by competing consortia, the consortium can only engage D and E.

It is common for consultants to seek to limit their liability, including their liability for consequential loss.

B. What Provisions of Construction Professionals' Appointments Are Most Heavily Negotiated? Are Liabilities Routinely Limited or Capped in Construction Professionals' Appointments?

I. Liability for Tender Services

Consultants generally seek to differentiate their liability for tender services by attempting to distinguish the standard of those services from its services during the delivery phase and impose a separate cap on liability for those services. However, contractors will generally aim to consolidate the consultant's liability for all services to prevent any avoidance of liability arising in the event of a breach for a particular service.

2. Fitness for Purpose and Process Risk Warranties

Consultants will almost always attempt to push back and limit any such warranties. Given that contractors are required to provide these warranties upstream, there is always a tension between what the contractor must warrant upstream and what a consultant is willing to warrant in its professional services agreement.

3. Information Documents

Those relate to:

- Information that parties can rely on.
- Consequential relief in the case of errors, omissions, discrepancies or inaccuracies in such information.

4. Insurance

The quantum of insurance is always heavily negotiated, particularly in relation to professional indemnity. Consultants also heavily guard the terms of their insurance policies. The provisions related to notification and disclosure of policies are heavily negotiated.

5. Liability Caps and Exclusions

Consultants often try to limit their liability to the same limit of their insurance proceeds. Additionally, consultants will always attempt to exclude all liability for indirect and consequential losses.

XV. Payment for Construction Work

A. What Are the Usual Methods of Payment for Construction Work? Are There Ways for the Contractor and Consultants to Secure Payment or Mitigate Risks of Non-Payment under Local Law?

1. Methods of Payment

Payment for work performed can be secured through either contractual or statutory methods. Contractual mechanisms include obtaining and calling on a parent guarantee from the principal's parent company, or, less commonly, an unconditional bond arranged by the principal.

2. Securing Payment

In most circumstances, the contractor has a statutory entitlement to progress payments under security of payment legislation, such as the Building and Construction Security of Payment Act 1999 in New South Wales (NSW). In some states, payment can be secured through a lien over the site or, in the case of a subcontractor, the transfer of the debt from the contractor to the principal. Similar security of payment legislation which entitles contractors to claim and receive regular progress payments for work performed, irrespective of whether the contract provides for such payments, has now been enacted in all states and territories. These interim payments are made prior to final determination of the contractor's entitlements in any formal dispute resolution proceedings. To use the security of payment regime, a contractor must:

- Submit a payment claim
- State that he is making the claim under the relevant legislation
- Set out the amount of the claim.

These requirements do not apply to NSW.

Recent changes to the security of payment regime in NSW and Queensland have seen the incorporation of maximum time frames for the payment of claims. For example, in NSW a principal must pay a contractor within 15 business days of receiving the relevant claim for payment.

The security of payment legislation in all Australian jurisdictions does not apply to any work carried out for the purpose of extracting minerals and natural gas. Additionally, in

Western Australia, construction work on a plant for the purposes of extracting or processing minerals, oil or gas is also excluded.

In the Australian Capital Territory, NSW, South Australia, Tasmania and Victoria, a contractor who has not been paid a progress payment that is due and owed, can exercise a lien over any "unfixed plant or materials supplied" by the contractor for use in connection with the work carried out. In these jurisdictions, the lien is extinguished the moment the unpaid amount is paid to the contractor.

XVI. Subcontractors

A. How Do the Parties Typically Manage Their Relationships with Subcontractors?

Prudent contractors will typically attempt to back down their upstream obligations and liabilities in their downstream subcontracts to the extent necessary for the relevant subcontractors' work. The extent of the pass-through will ultimately depend on the parties' relative negotiating power, the subcontract scope and the price. Contractors will generally either use their bespoke subcontract agreements for this purpose or prepare a project-specific subcontract using the upstream head contract as the base document.

Under a head contract, subcontracting will not relieve a contractor from its liability to a principal. Furthermore, there are generally restrictions in head contracts preventing a contractor from subcontracting all of the work. In addition, certain categories of subcontractors often require the principal's prior approval, which cannot usually be unreasonably withheld.

In addition, head contracts often dictate certain terms and conditions of subcontract agreements including those relating to supplier warranties, consents to novation and intellectual property.

XVII. Licensing

A. What Licences and Other Consents Must Contractors and Construction Professionals Have to Carry out Local Construction Work? Are There Any Specific Licensing Requirements for International Contractors and Construction Professionals?

The licensing requirements are the same for both domestic and international contractors and construction professionals. However, the scope of such requirements varies according to the relevant jurisdiction. In most Australian jurisdictions, whether a contractor must be licensed, registered, or both to perform construction work depends on the type, recipient and total value of the relevant work to be performed.

An outline of the relevant legislation for the different states and territories in Australia is set out below.

1. Australian Capital Territory

The Construction Occupations (Licensing) Act 2004, the Construction occupations (Licensing) Regulation 2004 and the Home Building Act 1989 cover most building works. Different licences are issued for specified types of buildings.

2. New South Wales

The Home Building Act 1989 covers residential building work or specialist work such as plumbing, gas fitting or electrical work.

3. Queensland

The Queensland Building and Construction Commission Act 1991 covers licences limited to classes of building or construction work.

4. South Australia

The Building Work Contractors Act 1995 covers various licences which are issued depending on the types of work.

5. Victoria

The Building Act 1993 covers most building works. Different licences are issued for specified types of buildings.

6. Western Australia

The Building Services (Registration) Act 2011 provides that different licences are issued for building practitioners and their contractors, each of which have separate licence classes.

Licences or registration are also required for:

- Onshore or offshore mining or exploration activities under the Mining Act 1978 in Western Australia.
- Architects, engineers and surveyors under:
 - the Architects Act 1929 in Tasmania;
 - the Engineers (Professional Engineers) Act 2002 in Queensland;
 - the Survey Act 1992 in South Australia;and
 - section 18 of the Architects Act 2003 in New South Wales, which allows foreign architects to apply for temporary registration.

It is an offence to breach the relevant licensing requirements. Disciplinary action can be taken against licensees in breach of those requirements. This generally is dealt with by way of fine. For example, in New South Wales, the maximum penalty for carrying out unlicensed work is A\$110,000 for a corporation and A\$11,000 for an individual.

B. What Licences and Other Consents Must a Project Obtain?

I. Before

Before commencing the works, any construction project will need key planning and environmental approvals before it can proceed. There is legislation that allows this process to be fast-tracked for some state-significant projects.

It is generally the principal who retains the responsibility for obtaining these key project approvals. However, the contractor can accept obligations to reasonably assist the principal.

Contracts entered into before such approvals are obtained are fully effective only once the approvals have been obtained on satisfactory conditions.

The nature of the approvals required during construction will depend on the nature of the project and its location. For example:

- If works are being performed near or adjacent to railways then certain rail access permits will be required from the relevant rail authority.
- If works are being performed adjacent to or near electricity lines then certain permits will be required for isolation and a permit to work. From a risk-allocation perspective, contractors are generally expected to take the risk of approvals required during the construction phase.

2. On Completion

The type of approvals that must be obtained on completion of a project will depend on the project itself. For example, once a residential construction project is complete, various inspections must be carried out in order to deem the space suitable for purpose. This will include obtaining an Occupancy Certificate and Fire Safety Certificate.

XVIII. Projects Insurance

A. What Types of Insurance Must Be Maintained by law? Are Other Non-Compulsory Types of Insurance Maintained under Contract?

I. Compulsory Insurance

There is no insurance that must be maintained by law in a construction project in Australia.

Whether insurance is required depends on:

- The nature of the activities.
- Where those activities will occur.
- How those activities will be undertaken.

Employment injury. If an entity involved in a project employs workers, the entity must obtain employers' liability insurance to provide cover for any injuries that its employees may sustain.

Each Australian state has its own legislation on employers liability insurance.

In New South Wales, the relevant provision is section 155 of the Workers Compensation Act 1987 No 70. This states that an employer, other than a self-insurer, must obtain from a

licensed insurer and maintain in force a policy of insurance that complies with the Act and is for:

- The full amount of the employer's liability under the Act in respect of all workers employed by the employer.
- An unlimited amount in respect of the employer's liability independently of the Act for any injury to any such worker. This does not include liability for compensation of workers arising under any Act or other law of another state, a territory or the Commonwealth, or liability arising under the law of another country.

The maximum penalty is 500 penalty units or six months' imprisonment, or both.

In Queensland, the relevant provision is contained in section 48 of the Workers' Compensation and Rehabilitation Act 2003. It provides that every employer must, for each worker employed by the employer, insure and remain insured (that is, be covered to the extent of accident insurance), against injury sustained by the worker for the employer's legal liability for compensation and damages.

Vehicles causing injury. If an entity owns vehicles that are registrable or can proceed on public roads, it must obtain insurance for those vehicles in the case injury is caused by them. Each state of Australia has its own legislation on vehicle insurance in such circumstances.

Other types of project insurance. If the project involves mining, states can impose a compulsory requirement to take out insurance to cover the risk of the project.

Any international contract where the works take place in Australia will be subject to the same requirements as a local contract.

2. Non-Compulsory Insurance

Parties that employ workers on site and at their offices will generally take out employment practices liability cover. This protects the employer and directors from compensation claims and defence costs arising out of the wrongful dismissal of employees. It will not insure the employer for fines or penalties.

There are other types of non-compulsory insurance that will be sought by developers, principal contractors and consultants on specific projects. These include:

- Contract works liability and material damage policies.
- Plant and equipment policies or endorsements.
- Industrial special risks with business interruption policies.
- Professional indemnity policies for consultants, such as architects and engineers.

Another important issue to note is that, because of the number of entities that will be involved in a contract of construction, a duplication of insurance policies is possible. The rights of some entities to recover insurance proceeds will be limited or subordinate to others.

XIX. Labour Laws

A. Are There Any Labour Law Requirements for Hiring (Local and Foreign) Workers?

I. Local Workers

Employees who are employed by an incorporated entity, including foreign companies operating in Australia, and all workers employed in the Australian Capital Territory or the Northern Territory are subject to the provisions of the Fair Work Act 2009 (Fair Work Act).

The federal regime does not apply to employees of unincorporated entities and employees of some state government employers. For example, in New South Wales, Queensland and South Australia the federal regime does not apply to most public sector and local government sector employees. Those states have their own regulations.

The Fair Work Act requires employers to comply with the National Employment Standards, which deal with a broad range of fundamental concepts relating to employment contracts.

Federal and state anti-discrimination legislation prohibits workplace discrimination and harassment. There are now at least 11 different acts of Parliament throughout Australia which deal with anti-discrimination laws.

A worker in the building and construction industry can also be covered by an award. Awards are quasi-statutory instruments that set out minimum terms and conditions of employment for employees in certain industries or occupations, above statutory minimums. Awards generally cover minimum wage, types of employment, overtime penalty rates, allowances, shift loadings and redundancy entitlements. Employers of workers covered by an award cannot contract out of the award entitlements. Penalties apply for non-compliance with minimum award entitlements.

The Building and Construction Industry Improvement (Transition to Fair Work) Act 2012 is another source of labour law which specifically applies to the construction industry. It prohibits unlawful industrial action while protecting freedom of association.

2. Foreign Workers

The labour laws applicable to local workers also apply to foreign workers.

However, all foreign nationals employed in Australia must have a work visa that permits them to work in Australia before commencing work on a project. The Subclass 457 Temporary Work (Skilled) Visa allows skilled workers to come to Australia and work for an approved business for up to four years.

B. Which Labour Laws Are Relevant to Projects?

The labour laws applicable to local workers are also relevant to projects (*see Section XIX.A*).

Other relevant laws include:

- Enterprise agreements that may be made under the Fair Work Act between an employer and a group of employees. There are three types of enterprise agreements: single-enterprise agreement, multi-enterprise agreement and Greenfields agreement. Once drafted and approved by the employees, the agreement must be approved by the Fair Work Commission before it comes into operation.
- Obligations on employers to make compulsory minimum contributions to superannuation funds on behalf of each employee, in addition to the salary or wages that the employer pays.
- Workers' compensation legislation, which varies in different states and governs the maintenance of insurance by the employer with respect to workplace injuries and accidents.
- Codes of practice and guidelines that have been issued by the federal government and some state governments that regulate employment conditions on government construction and project sites.

C. Must an Employer Pay Statutory Redundancy or Other Payments at the End of a Project? Are All Employees Eligible?

An employer will generally be required to give an employee redundancy pay if they are made redundant. Redundancy payments will be based on the length of the employee's continued service with their employer. The minimum obligations are set out in the Fair Work Act. If an employee is covered by a registered enterprise agreement, the terms of the agreement will generally stipulate what kind of redundancy payment applies. The terms of an award, employment contract or company policy can also provide for an entitlement to redundancy pay.

There are employees to which the employer is not required to make a redundancy payment. These include:

- Casual employees.
- Apprentices.
- Employees whose period of continuous service is less than 12 months.
- Employees whose employment was terminated as a result of serious misconduct.
- Employees of small businesses that employ less than 15 employees.

XX. Health and Safety

A. Which Health and Safety Laws Apply to Projects?

Currently, all Australian states and territories, except Victoria and Western Australia, have introduced harmonised state work health and safety legislation. Work health and safety legislation imposes statutory duties of care on persons conducting a business or undertaking (PCBUs) to protect the health and safety of others. It also imposes personal obligations on officers to exercise due diligence to ensure the PCBU is complying with its obligations.

In addition to a PCBU's common law duty of care, work health and safety legislation imposes a number of broad general obligations, including obligations to:

- Ensure, as far as reasonably practicable, the health, safety and welfare of all persons performing work for the PCBU. This includes employees, labour hire personnel and contractors.
- Protect others from risks to their health and safety.

The statutory obligations are deliberately wide and general, but PCBUs must also be aware of the increasingly complicated web of specific obligations, standards and other industry guidance materials, such as:

- Occupational health and safety regulations.
- Industry-specific regulations, such as those for mining.
- Codes of practice.
- Court decisions.
- Safety alerts.

- Australian Standards.

Liability under the safety legislation does not arise only after an incident occurs. The duties under the legislation require PCBUs to manage health and safety risks. This requires a proactive approach to ensure:

- A proper health and safety management system is implemented on a project.
- A regime of monitoring work activity to ensure safety outcomes on an ongoing basis.

A failure to comply with such duties can result in civil and criminal penalties.

Depending on the category of the offence, an employer may be liable to up to A\$3 million (for a corporation) or A\$600,000 (for an individual). An employer who is an individual or an officer of the employer may also be liable for up to five years' imprisonment.

XXI. Environmental Issues

A. Which Local Laws Regulate Projects' Effects on the Environment?

The effects of projects on the environment are regulated by the planning and environmental laws of Australia. Environmental law matters are regulated at three levels: federal, state and local.

I. Federal Environmental Laws

The Australian Constitution gives the federal government the power to make laws with respect to matters of national environmental significance. Environmental regulation of all other matters is administered at the state and local government levels.

A project may need to be assessed under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) if there is a possibility that it may significantly impact on a matter of national environmental significance. There are other federal acts that can impose obligations on parties involved in construction projects, such as the Water Act 2007 and the Great Barrier Reef Marine Park Act 1975. The EPBC Act also contains provisions intended to regulate unlawful impacts on matters of national environmental significance.

2. State and Local Environmental Laws

State and local environmental laws govern whether a construction project must have its environmental impacts assessed, and the level and detail of assessment required. Those laws also impose obligations and/or penalties for unlawful environmental impacts of those project activities.

Both states and territories have large and complex legislative and policy frameworks that regulate impacts on the environment, including the often overlapping planning assessment and environmental impact assessment of construction projects. The main environmental statutes in each state or territory are as follows:

- Queensland:
 - Environmental Protection Act 1994;
 - Sustainable Planning Act 2009;
 - Water Act 2000.
- New South Wales:
 - Protection of the Environment Operations Act 1997;
 - Environmental Planning and Assessment Act 1979;
 - Water Act 1912;
 - Water Management Act 2000.
- Australian Central Territory:
 - Environment Protection Act 1997;
 - Planning and Development Act 2007;
 - Water Resources Act 2007.
- Victoria:
 - Environmental Protection Act 1970;
 - Water Act 1989.
- Tasmania:
 - Environmental Management and Pollution Control Act 1994;
 - Water Management Act 1999.
- Western Australia:
 - Environmental Protection Act 1986;
 - Rights in Water and Irrigation Act 1914.
- Southern Australia:

- Environment Protection Act 1993;
- Natural Resources Management Act 2004.

These Acts deal with matters relating to the impact of construction projects on the environment, including water use and discharge, air and noise emissions, and waste and recycling. These regulations and policy frameworks place constraints on construction project assessments.

Each state and territory regulates and manages systems for pollution control, contamination, hazardous materials, waste disposal and biodiversity protection through legislation and environmental protection agencies (EPAs).

While the states and territories take different approaches to some environmental matters, environmental laws share many common elements, for example regarding:

- **Pollution control.** All states and territories regulate the discharge of pollutants into the air, land and water. EPAs and other regulatory agencies generally require polluting industries, such as the construction industry, to obtain licences. These licences establish limits on permitted discharge quantities for specific pollutants.
- **Hazardous materials.** Most states and territories regulate the storage, use and transportation of hazardous materials and waste at construction sites. Any enterprise that generates, transports or treats waste or operates a landfill requires a permit.

In some cases, depending on the nature and impact of the project, additional legislation may also apply. For example, in Queensland certain projects may need to consider requirements for approvals or other constraints under the:

- Water Act 2000.
- Vegetation Management Act 1999.
- Nature Conservation Act 1992.

Several states also have special purpose legislative tools for assessing the environmental impact of major or significant construction projects against different criteria or by using more streamlined processes, such as the State Development and Public Works Organisation Act 1971 in Queensland.

3. Environmental Impact Assessments (EIAs)

The test for determining whether an EIA is required differs from state to state and at the federal level. However, generally if a proposed project is likely to have a significant impact on a matter of national, state or local environmental significance, as determined by the applicable federal, state and local laws, an environmental assessment and final approval may be necessary.

An EIA focuses on the biophysical, social and economic impacts of the project. If an environmental or planning approval is granted, the relevant decision-maker can impose conditions on the development of a project, including:

- A financial security.
- Insurance.
- An independent environmental audit.
- Plans for managing impacts of the action.
- Environmental monitoring or testing.
- Compliance with non-statutory instruments and codes of practice, such as Australian Standards.

The EIA process will usually require public involvement in helping to identify issues and may include rights for submitters or objectors to appeal the grant of an approval, or its conditions.

Whether or not a project must undergo an EIA will depend on the federal, state and local legislation applicable to the project, and on the nature and the impact of the project. More minor projects and projects with limited impact on the environment will not always need to go through a full EIA process.

4. Sustainable Development

Construction projects may need to consider the sustainability of their construction practices based on EIA approval conditions. Australia's environmental legislation obliges persons undertaking certain activities and decision-makers assessing the impacts of those activities, or preparing local and regional planning documents, to have regard to the principles of ecologically sustainable development (ESD).

Australia's National Strategy for Ecologically Sustainable Development (1992) defines ESD as: "using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased".

Federal, state and local environment and planning legislation incorporate these principles into planning approval and EIA processes. However, those may not always use the term ESD or define it in exactly the same way.

The object of the federal EPBC Act is to promote ESD through the conservation and ecologically sustainable use of natural resources. It builds on the following ESD principles:

- Decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations.

- If there are threats of serious or irreversible environmental damage, lack of full scientific certainty must not be used as a reason for postponing measures to prevent environmental degradation.
- The present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations (principle of inter-generational equity).
- The conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making.
- Improved valuation, pricing and incentive mechanisms should be promoted.

Most of the primary environmental and planning legislation and policy frameworks in each state also include the ESD principles within their broader objectives.

In construction projects, the ESD principles are also considered when:

- Making decisions regarding the level of EIA required for projects.
- The approving agency imposes approval conditions, which must be prepared in light of the ESD principles (*sections 37B and 136, EPBC Act*).

B. Do New Buildings Need to Meet Carbon Emissions or Climate Change Targets?

The Australian Government ratified the Kyoto Protocol in December 2007.

The Kyoto Protocol requires Australia to limit annual carbon pollution to an average of 108% of 1990 levels during the first commitment period (2008 to 2012). The Commonwealth Government's current target for the following period is to cut emissions to 5% below 2000 levels by 2020. The Federal Government has stated that it will increase this target to 15%, or 25% below 2000 levels if certain criteria are met in international agreements for the global reduction of emissions. The government also has a long-term commitment to reduce carbon pollution in Australia by 80% of 2000 levels by 2050.

Australia is looking to meet this obligation through a wide range of measures including:

- Improving energy efficiency standards for buildings and products.
- Improving carbon stocks in land and vegetation.
- Promoting ways of reducing emissions from emissions-intensive sectors.

In relation to buildings specifically, in 2008 the Council of Australian Governments (COAG) developed the National Strategy on Energy Efficiency, which guides government policy on energy efficiency measures for a range of different building types, among other products. The National Construction Code includes energy efficiency measures for all building classifications.

Pursuant to the principles agreed in the National Strategy, the state governments are in various stages of implementing agreed measures to improve the overall energy efficiency of Australia's existing and future building stock. For new buildings and major refurbishments, this is usually achieved through efficiency standards in the building codes underlying planning and building standards legislation. Buildings must achieve a specified "star rating" for energy efficiency, which rates buildings from zero to six stars depending on their greenhouse performance and energy savings. The rating is based on the National Australian Built Environment Rating System (NABERS). The Energy Efficiency in Government Operations (EEGO) Policy contains additional requirements for energy targets for office buildings that are owned or leased by the Commonwealth Government.

The star rating required for each building classification may differ from state to state. The legislation and building codes in each state must be considered when identifying applicable energy efficiency requirements for new building projects.

The Building Energy Efficiency Disclosure Act 2010 also requires most sellers and lessors of office space of 2000 square metres or more to obtain a Building Energy Efficiency Certificate before selling or leasing the building.

XXII. Prohibiting Corrupt Practices

A. Are There Any Rules Prohibiting Corrupt Business Practices and Bribery (Particularly Any Rules Targeting the Projects Sector)? What Are the Applicable Civil or Criminal Penalties?

I. Rules

In Australia, there is no single anti-corruption policy or law.

The two most significant pieces of legislation that aim to regulate business practices are the Corporations Act 2001 and the Competition and Consumer Act 2010. Both are Commonwealth laws that outline best practices for directors and employees in the running of businesses and corporations. The two Acts can impose strict monetary penalties on directors, employees and corporations that engage in prohibited practices. Under the Criminal Code Act 1995, it is an offence to bribe foreign public officials. It is also an offence under the relevant state and federal criminal laws to bribe Australian public officials. These offences are punishable by fines and, in some cases, imprisonment.

2. Penalties and Enforcement

The penalty for foreign corruption can be either of the following:

- A maximum of ten years' imprisonment.
- A fine of up to A\$1.1 million for individuals and A\$11 million for companies or three times the value of the benefit obtained, whichever is greater.

A company can be liable, even if its management did not authorise and was not aware of the bribe, if the company had a corporate culture that tolerated bribery or did not require compliance with the laws against bribery.

If a contractor has illegally obtained the award of a contract, the contract will likely be void and unenforceable. If the contract substantially lessens competition, it will be unenforceable under the Competition and Consumer Act.

XXIII. Bankruptcy/Insolvency

A. What Rights Do the Client and Funder Have on the Contractor's Bankruptcy or Insolvency?

Construction contracts commonly include a provision that allows the principal to terminate a contract in the event of a contractor's insolvency. Such a clause will usually provide for the assignment of subcontracts to the principal so that works under the contract can continue.

What constitutes insolvency giving rise to a right to terminate will depend on the precise terms of the contract. The contract can define insolvency by reference to the formal appointment of a liquidator or administrator, or it can be broader and refer to other events which precede the appointment of a liquidator or administrator.

Construction contracts often include a provision that gives the principal the right to appoint a new contractor in place of the insolvent contractor and recover the costs of doing so from the contractor in liquidation or administration.

XXIV. PPPs

A. Are Public Private Partnerships (PPPs) Common in Local Construction Projects? If So, Which Sectors Commonly Use PPPs?

Australian governments recognise that infrastructure investment is critical to economic prosperity and actively welcome the participation of the private sector in the delivery of infrastructure and related public services through PPPs. In line with the National PPP Policy, the Australian federal, state and territory governments will consider a PPP for any project with a capital cost in excess of \$A50 million.

The most prominent sectors in which PPPs are commonly used include hospitals, education and transport.

B. What Local Laws Apply to PPPs?

The Council of Australia Governments endorsed the National PPP Policy and Guidelines on 29 November 2008. These guidelines apply to each of the states and territories of Australia. Some states also have their own jurisdictional policies that are applied alongside the guidelines. Foreign companies should note that, while there is substantial harmonisation in processes and risk models used by governments in the various Australian jurisdictions through these National Guidelines, there remain some exceptions to the National Guidelines.

The guidelines consist of:

- The National PPP Policy Framework.
- The National PPP Guidelines Overview.
- National PPP Guidance Material consisting of seven volumes of comprehensive guidance material covering topics such as commercial principles for social infrastructure, public sector comparator guidance, discount rate methodology, jurisdictional requirements and commercial principles for economic infrastructure.

Foreign companies can participate in Australian PPPs, including as concessionaires, builders, operators or financiers.

C. What Is the Typical Procurement/Tender Process in a PPP Transaction? Does the Government or Another Body Publish

Standard Forms of PPP Project Agreement and Related Contracts?

PPPs are typically procured through a competitive tender process of shortlisted tenderers. The key stages are:

- Release of expression of interest.
- Shortlisting and release of request for proposals (RFP).
- RFP process and selection of a preferred bidder.
- Contractual close.
- Financial close.

There is currently no standard form of PPP project contract used throughout Australia. However, the Commonwealth Government has initiated steps to better harmonise state governments' procurement processes for PPPs by establishing a Commonwealth advisory body, "Infrastructure Australia", and appointing a Commonwealth Minister for Infrastructure. Projects such as the Brisbane North-South Bypass Tunnel, Brisbane Airport Link and East West Link also illustrate the intent of individual markets to standardise approaches to contractual risk by using similar starting documentation.

XXV. Dispute Resolution

A. Which Are the Most Common Formal Dispute Resolution Methods Used? Which Courts and Arbitration Organisations Deal with Construction Disputes?

I. Formal Dispute Resolution Methods

The most common formal dispute resolution methods used are arbitration and litigation. Where a case is heard will depend on the:

- Nature of the dispute.
- Causes of action which form the basis of a claim.
- Value of the dispute.

High value disputes are generally determined in the superior courts of the states and territories. Lower value disputes are determined in the lower courts and tribunals.

Legislative changes have recently been made to increase the use of domestic arbitration. However, arbitration remains the dispute resolution method of choice for contracts involving international parties.

3. Courts and Arbitration Organisations

Each state and territory has its own Supreme Court. The relevant court rules in each state and territory determine the jurisdiction of the Supreme Court.

The arbitration institutions that are most commonly used to arbitrate domestic construction disputes are the:

- Institute of Arbitrators and Mediators Australia (LEADR & IAMA) (www.leadriama.org).
- Chartered Institute of Arbitrators Australia (CIARB) (www.ciarb.net.au).
- Australian Centre for International Commercial Arbitration (ACICA) (www.acica.org.au).

The arbitration institutions that are most commonly used to arbitrate international construction disputes are the:

- International Chamber of Commerce (ICC) (www.iccwbo.org).
- International Centre for Dispute Resolution (ICDR) (www.icdr.org).
- ACICA.

B. What Are the Most Commonly Used Alternative Dispute Resolution (ADR) Methods?

Alternative dispute resolution (ADR) methods are regularly used in construction contracts. The most commonly used forms of ADR in Australia include:

- Negotiation between nominated senior executives of the parties.
- Mediation.
- Independent expert determination.
- Boards of review, also known as dispute review boards.

Adjudication of payment disputes under the various security of payment legislation is also commonly used in Australia.

XXVI. Tax

A. What Are the Main Tax Issues Arising on Projects?

Major projects can encounter a range of tax issues in Australia, particularly relating to stamp duty and income tax.

Each state and territory has its own stamp duty regime, with some jurisdictions imposing duty only on transfers of land, and others continuing to impose duty on transfers of non-land business assets. Stamp duty is also generally charged on the transfer of interests in entities that have significant land-holdings. Stamp duty is still imposed on certain types of mortgages in New South Wales.

At federal level, companies pay 30% income tax on taxable profits. Taxable profits include both revenue and capital receipts. Under Australia's international tax treaties, liability for Australian income tax can attach to profits made in connection with a permanent establishment in Australia. This often includes construction projects.

It is important to establish whether project participants account for expenses as upfront deductions from taxable profits or by a range of staggered methods of expense accounting. If a company has made tax losses in the course of a construction project, difficulties can arise in relation to retaining those losses if the shareholders of the company seek to dispose of their interests or if the company seeks to adapt its business operations.

Multinational entities in particular should be aware that limits are placed on the degree to which companies can be funded by debt. Broadly, the current rules allow for a 60/40 ratio of debt to equity. However, these rules may be subject to change. Upstream distributions to a foreign creditor or shareholder may be subject to interest or dividend withholding tax, chargeable at a rate depending on the treaty status of the foreign country involved. A specific withholding regime applies to payments made to foreign entities involved in construction projects.

A variety of entities in Australia, including some types of partnerships and trusts, receive flow-through treatment for income tax purposes. Trusts are very widespread in Australian tax structuring and can provide some conceptual difficulties for non-resident investors who are more familiar with other forms of entities, such as limited partnerships.

A range of registration, payment and reporting requirements may apply to project participants, including pay-as-you-go withholding tax and goods and services tax.

Land tax is levied at state or territory level and council rates are levied at local council level.

B. Are Any Methods Commonly Used to Mitigate Tax Liability on Projects? Are There Any Tax Incentives to Carry out Regeneration Projects?

Stamp duty can be a significant cost in the context of major construction projects and parties often try to structure their participation in a way that stamp duty liability is kept to a minimum. For example, parties tend to avoid the unnecessary transfer of interests in land or assets. A variety of exemptions to the various transfer stamp duty regimes are available, such as limited exemptions for transfers between related entities. Some exemptions are available from goods and services tax, particularly where the relevant supply is one of a continuing business (going concern).

Rates of withholding tax are frequently modified by tax treaties. Where cross-border payments are likely to be made by project participants, parties must carefully consider the applicable treaty arrangement. Exemptions from the withholding regime are available, with requirements varying depending on whether an Australian permanent establishment is involved.

XXVII. Other Requirements for International Contractors

A. Are There Any Specific Requirements That International Contractors or Construction Professionals Must Comply with?

In addition to licensing requirements for carrying out building work (*see Section XVII.A*), the Corporations Act 2001 requires foreign companies that wish to conduct business in Australia to register with the Australian Security and Investment Commission (ASIC). This includes international contractors that intend to commence projects in Australia. An international contractor can either:

- Register as a foreign company with a branch office in Australia identified by an Australian Registered Body Number.
- Purchase an existing or incorporate a new local Australian subsidiary company identified by an Australian Company Number.

In practice, an international contractor intending to operate substantially in Australia will incorporate or establish a local Australian company for taxation, statutory reporting and operational reasons. An Australian branch of an international contractor is not a separate legal entity and its debts and obligations flow back to the overseas corporation.

To incorporate a new Australian subsidiary, a foreign company must:

- Appoint directors, at least one of whom resides in Australia.
- Open a registered office in Australia.
- Establish a shareholding registry and inject capital

The Federal Treasurer can examine foreign investment by way of share or asset acquisitions, including shares of incorporated joint ventures. The investment may also need to be approved by the Foreign Investment Review Board under the Foreign Acquisitions and Takeovers Act 1974. Foreign investment proposals can be blocked or made subject to conditions if the Treasurer determines that they are against Australia's national interest. Generally, however, most proposals are approved without conditions.

XXVIII. Reform and Trends

A. Are There Any Proposals to Reform Construction and Projects Law? Are There Any New Legal or Regulatory Trends Affecting Projects?

I. Reform Proposals

There has recently been significant reform concerning security of payment legislation in certain Australian states.

Queensland. There have been amendments to the Building and Construction Industry Payments Act 2004 (BCIPA) around four key areas, namely:

- Time frames for claimants and respondents in respect of payment claims.
- Notice requirements prior to court proceedings.

- The division of "standard" and "complex" claims, and different procedures for both.
- The claimant's ability to withdraw adjudication proceedings.
- The appointment of adjudicators regulated by the Queensland Building and Construction Commission.

Contracts that were entered into before 1 September 2014 will not be subject to the reforms and the old BCIPA time frames will still apply to those.

New South Wales. The News South Wales Parliament has recently enacted the Building and Construction Industry Security of Payment Amendment (Retention Money Trust Account) Regulation 2015 (NSW). The Regulation will apply to contracts entered into from 1 May 2015. It requires head contractors in projects valued at A\$20 million or more to retain money held by them in trust for the subcontractors. That money must be held in a trust account established with an authorised deposit-taking institution. The Regulation will impose a number of administrative and reporting requirements on head contractors.

2. Trends

See Section I.A.

XXIX. Main Construction Organisations

A. Engineers Australia

Main activities. Engineers Australia is the national forum for the advancement of engineering and the professional development of its members.

W www.engineersaustralia.org.au

B. Master Builders Association

Main activities. The Master Builders Association is the major Australian building and construction industry association. Its primary role is to "promote the viewpoints and interests of the building and construction industry and to provide services to members in a broad range of areas including training, legal services, industrial relations, building codes and standards, industry economics and international relations".

W www.masterbuilders.com.au

C. Australian Institute of Building

Main activities. The main objective of the Australian Institute of Building is to promote excellence in the construction of buildings and just and honourable practices in the conduct of business.

W www.aib.org.au

D. Australian Institute of Building Surveyors

Main activities. The Australian Institute of Building Surveyors is primarily committed to the professional development of its members through the development of clear educational pathways to ensure constant supply of well-educated building surveyors.

W <http://aibs.com.au>

E. Australian Constructors Association (ACA)

Main activities. The ACA represents leading construction and infrastructure contracting companies. The ACA is dedicated to promoting a sustainable construction industry for Australia.

W www.constructors.com.au

XXX.About the Authors

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Areas of practice. Dispute resolution; litigation; construction; infrastructure; natural resources; oil and gas.

Recent transactions

Aleisa has practised in construction and major projects since 2004, advising on significant construction projects. Her recent experience includes:

- Conducting and providing strategic advice to clients involved in major domestic and international litigation and arbitration concerning oil and gas facilities.
- Acting for the design and construct contractor for the Gold Coast Rapid Transit Project.
- Project delivery advice to a multinational joint venture for construction of a A\$1 billion LNG pipeline in Queensland.
- Advising a large contractor in the coal industry in relation to the multi-billion dollar expansion of a coal terminal.
- Advising both principals and contractors on the security of payment process.

Languages. English

Professional associations and memberships. Queensland Law Society, Queensland Law Society Construction and Infrastructure Law Committee; Society of Construction Law; National Association of Women in Construction; Women Lawyers Association of Queensland.

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Professional Qualifications. Admitted New South Wales, 2006, University of New South Wales, Bachelor of Laws, Building Construction Management (Hons, 1st class).

Areas of practice Construction, Energy, Infrastructure, Major Projects, Mining, PPPs, Renewables.

Recent transactions

Franco has widespread transactional experience in major infrastructure projects including government-funded projects and public private partnerships. He also has extensive experience in the documentation and negotiation of water and salt process plant projects, renewables projects, mining and coal-seam gas projects and port development projects. His recent experience includes acting for:

- A major international and Australian contractor on their respective bids for Westconnex 1A (M4 Widening) and Westconnex 1B (major road and tunnel) (New South Wales).
- A major Australian contractor on its bid for the Gateway Upgrade North Project (Queensland).
- A major international contractor on its bid for the Cavite-Laguna Expressway PPP (Philippines).

Languages. English, Italian

Professional associations and memberships. Law Society of New South Wales; Society of Construction Law.

Publications

- Editor of the Construction Law International Law Journal.
- Co-authored "Game, Set and Match in the High Court - Fiduciary duties in a contractual context", Business Law International Journal.