HERBERT SMITH FREEHILLS

DOING BUSINESS IN AUSTRALIA

CONSTRUCTION AND INFRASTRUCTURE

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Chapter 20

Construction and Infrastructure

Australia's construction and infrastructure market continues to grow. With the mining industry experiencing a slight recession in very recent years, both the Federal Government and the various state governments have shifted their focus to infrastructure. This has become evident with the most recent Federal Budget increasing investment in transport, defence and renewable energy.

The Federal Government has:

- cumulatively over the past four years committed to investing over A$70 billion in transport through a combination of grant funding, loans and equity investments in transport infrastructure by 2020-21;
- committed to a twenty year defence industry plan which aims to secure the local defence manufacturing industry through initiatives including the A$50 billion Future Submarine program and the A$35 billion Future Frigate program;
- stated that it plans to invest over A$6 billion on climate spending from 2018/19 to 2021/22, including investing in newer technologies through the Australian Renewable Energy Agency and providing debt and equity to support clean energy projects through the Clean Energy Finance Corporation; and
- committed to establishing a 10 year allocation fund which will deliver A$75 billion in transport infrastructure funding and financing from 2017/18 to 2026/27.

State governments are also investing record amounts on infrastructure, with the New South Wales Government allocating A$87 billion over the next four years to its infrastructure program (with A$51.2 billion of this committed to public transport and roads projects) and the Victorian Government projecting it will spend A$13.4 billion on infrastructure in the 2018/19 year alone.

These government investment initiatives are strong indicators of a continually developing construction and infrastructure market.

Construction and Infrastructure in Australia is regulated by federal, state and territory legislation. Often case law also provides an overlay. The nature and source of the regulation in this area depends on the type of activity being regulated and the type of issues involved.

Building law

The Australian Government regulates matters including:

- the formation and management of corporations, pursuant to the *Corporations Act 2001* (Cth) (see Chapters 2 'Corporate regulators', 3 'Business structures', and 5 'Acquisitions and disposals of business', of this publication for more detail);
- compliance by industry participants with workplace relations laws, pursuant to the Australian Building and Construction Commission and the Building Code established by the *Building and Construction Industry (Improving Productivity) Act 2016* (Cth);
- the publication of national building regulations and standards, including the National Construction Code (which is published by the Australian Building Codes Board and is given legal effect by relevant legislation in each state and territory);
- the health and safety of industry participants and their employees, pursuant to the *Work Health and Safety Act 2011* (Cth) (note that all states and territories except Western Australia and Victoria have adopted and implemented the federal legislation which came into effect on 1 January 2012);
- matters in relation to independent contractors pursuant to the *Independent Contractors Act 2006* (Cth); and
- fair trading and consumer protection, pursuant to the Australian Consumer Law (see Chapter 15 of this publication, 'Consumer protection and product liability', for more detail).

The state and territory governments are responsible for regulating various matters including:

- general construction law pursuant to a variety of building legislation and standards, licensing and accreditation requirements in each state and territory;
- proportionate liability of wrongdoers pursuant to various state and territory wrongs legislation;
- supervision of the residential building industry; and

- the approval of development applications, building works and the final approval of construction works pursuant to various legislation in each state and territory.

Certain state and territory jurisdictions in Australia also have designated 'major project' style infrastructure legislation which is designed to streamline the early stages of key infrastructure projects to facilitate the obtaining of required land and planning and environmental approvals. For instance, in Victoria, if a project is declared a transport project to which the *Major Transport Projects Facilitation Act 2009* (Vic) will apply, then major state approvals can be obtained pursuant to that Act's streamlined processes, rather than a comprehensive impact statement or impact management plan being required.

Also, given the significant impact certain construction and infrastructure projects may have on the local environment and population in and around the project site, certain local government permits and approvals are generally required, and the conditions of these must be complied with. The conditions primarily relate to planning and environment laws (see Chapter 17 of this publication, 'Environmental and planning regulation'), but may also include functions delegated to the local government entity by the state.

Finally, most contractual relationships for construction work in Australia between developers, builders, contractors and subcontractors are governed by the relevant state and territory security of payment legislation (**SOP legislation**). SOP legislation aims to keep projects moving by using very prescriptive and fast payment regimes. It is often referred to as a 'pay now, argue later' type payment system. SOP legislation is strict and if not complied with can have legal and commercial implications on projects. One difficulty of the SOP legislation is that it varies in each state and territory within Australia. Currently, the construction industry is looking into the feasibility of adopting a national security of payment system but until the legislation is harmonised, parties to a construction contract should be wary of the often subtle but crucial differences in the SOP legislation across Australia.

Nature of construction and infrastructure industry in Australia

The Australian construction and infrastructure industry is characterised by:

- a mix of privately funded and publicly (federal and state) funded projects;
- a high percentage of public procurement of key infrastructure occurring through 'public private partnership' programs where private sector consortia bid for and then finance, deliver, operate and hand back infrastructure, while a number of projects are still delivered by 'direct government procurement';

- a concentration of a few very large construction companies, including CIMIC/CPB, Thiess, John Holland and Lendlease, together with a number of other large but slightly more specialised contractors, including Laing O'Rourke, McMahon, Downer, Clough, Multiplex, Transfield and Grocon; there are also a number of international builders and infrastructure providers with operations here, including Bechtel, PCL, Acciona, Bouygues, Siemens, Dragados, Ferrovial and Samsung;
- a heavily unionised workforce, both in construction and operations, requiring employers and principals to have clear and well-thought-out industrial relations strategies; and
- several dominant subject sectors, including:
    - mining and resources (including related mines, rail links, ports and other facilities such as LNG terminals)—for more detail see Chapter 19 of this publication, 'Natural Resources';
    - energy (including generation, transmission and distribution);
    - roads and transport;
    - social infrastructure (such as schools, hospitals and housing);
    - property development; and
    - entertainment,

each with their own considerations and market norms, industry drivers and key players.

Other characteristics of the Australian construction and infrastructure industry which may differ from what foreign infrastructure players are used to elsewhere are:

- a relatively high level of environmental and planning compliance obligations, including in relation to heritage and native title (see section 19.4 in Chapter 19 of this publication, 'Natural Resources', for more detail);
- a relatively stable government decision-making environment with low sovereign risk;
- certain foreign investment restrictions (see section 2.5 in Chapter 2 'Corporate Regulators' and section 19.6 in Chapter 19 'Natural Resources' of this publication for more detail);

- more strict enforcement of contractual rights and obligations than in some jurisdictions; however, punitive damages are rarely awarded (and are relatively small if awarded); and
- the ability of the principal to appoint the contractor as 'principal contractor' to ensure a single, non-delegable point of responsibility for compliance with workplace, health and safety laws.

Unsolicited proposals

Unsolicited proposals are being increasingly utilised by the private sector and governments to drive innovation and accelerate the delivery of infrastructure projects. An unsolicited (or market-led) proposal is a proposal initiated by the private sector to build or finance an infrastructure project, without a formal request or tender from the government.

Governments generally welcome and encourage unsolicited proposals, where they create unique opportunities to provide important infrastructure to the community. However, given that unsolicited proposals operate outside the standard competitive processes, each state and territory has developed robust guidelines to ensure transparency and fairness. Pursuant to these guidelines, it is of primary importance that the proposal demonstrates unique advantages and will result in positive outcomes for the community.

Government guidelines impose additional criteria, including that the proposal:

- aligns with government policy;
- is feasible and capable of delivery; and
- represents value for money.

Building contracts and remedies

Construction and infrastructure projects in Australia invariably involve many parties—government, equity funders, debt funders, designers, builders, operators, subcontractors and users, among others. In the common law tradition, relations between all of these parties are almost always regulated by contract. Usually such contracts are reduced to writing. Provided certain formalities are satisfied, the parties’ agreement in such contracts is binding on them and their counterparties and is enforceable through the courts.

Building contracts in Australia vary in many ways; however, a key manner in which they differ is the level of risk and control which is passed to the contractor. The agreements vary, ranging from fixed time and cost, lump sum, design and construct, engineer, procure and construct turnkey contracts, through to cost-plus, contract management and contractual alliances. Moreover, principals may have one contract with a contractor who then subcontracts out the work (with the contractor bearing integration, coordination and interface risk), or the principal may retain integration, coordination and interface risk by contracting out various portions of work to a number of contractors.

Key issues which frequently occupy significant time and effort when negotiating building contracts in Australia (and which are more likely to lead to dispute) include:

- responsibility for site conditions;
- responsibility for planning consent;
- circumstances entitling variations;
- circumstances entitling time and cost relief;
- level of contract price, performance security and liquidated damages;
- completion requirements;
- the principal's ability to complete works warranties, including a fitness for purpose warranty;
- indemnities and insurance;
- any liability exclusions and limitations; and
- consequences of and circumstances entitling termination.

Building and related contracts will frequently include the requirements of other project stakeholders (even though those stakeholders are not parties to the building contract), such as banks, government or offtakers (such as the party to whom a power station's electricity is contracted to). These requirements must also be complied with by the parties.

The most common contractual remedies pursued by parties in Australia are:

- **Termination**—this enables a wronged party to regard the contract as at an end (for

example, where the principal has not provided the contractor access to the site within a maximum prescribed period). Termination may be used in conjunction with other remedies. In 2018 the Federal Government introduced an *ipso facto* regime through the *Treasury Laws Amendment (2017 Enterprise Incentives No. 2) Act 2017* (Cth), which restricts a party from exercising any contractual right (including to terminate a contract) solely on the basis that its counterparty has entered into certain types of restructuring or insolvency procedure (see discussion in Chapter 9 of this publication, 'Restructuring and insolvency' for more detail). This new regime applies to the majority of construction contracts entered into on or after 1 July 2018 (but note that there are a number of contract types excluded from this regime, including certain arrangements that involve a special purpose vehicle in a public-private partnership).

- **Damages**—the general principle behind contractual damages in Australia is to as closely as possible restore the wronged party to the position it would have been in pursuant to the contract had it not been wronged, provided that the wronged party has not also breached the relevant contract and that other formal requirements are satisfied.

- **Specific performance**—this also aims to restore the wronged party to the position it would have been in pursuant to the contract had it not been wronged by requiring the breaching party to perform its contractual obligation (for example, supply a transformer or complete construction of a building), and is typically used where damages are regarded as an inadequate remedy.

- **Injunctions**—this is used to restrain a party from carrying out a certain act where that act is or may be prohibited by contract.

Contractual remedies are further supplemented in Australia by:

- **equitable remedies**, which include specific performance and injunctions (although different to those under contract) and rescission, rectification, estoppel and constructive trusts;

- **tortious remedies**, such as damages, specific performance and injunctions (although again different to those under contract and at equity) for torts such as negligence and nuisance; and

- **statutory remedies**, such as those under the Australian Consumer Law for misleading and deceptive conduct or fines and penalties under other statutes.

Contractual counterparties are entitled to liquidate their losses by contract in Australia, provided that such liquidated losses are a genuine pre-estimate of the loss which will be suffered by a party if the given circumstance occurred, and that such losses are not penal in nature and therefore unenforceable. Delay and performance liquidated damages are typically provided for in construction contracts in Australia.

Standard contracts

Standardised contracts are often (although not always) used in construction and infrastructure contracting in Australia. The principal and contractor agree at the outset of negotiations which (if any) form of standardised contract will be used as a basis for negotiations, and then agree on departures from that standard form to tailor the contract to the specific risks of the project, parties and risk allocation sought for the project. Large contractors or large procurers of construction or engineering services may also have their own corporate 'preferred/standard' form contracts.

Standardised contracts are rarely used unamended.

Standardised construction contracts used in Australia include those published by two organisations:

- the International Federation of Consulting Engineers (**FIDIC**); its contracts include design-build and turnkey (orange book) and plant and design-build (gold book) contracts, typically used on projects involving a number of international parties; and
- Australian Standards; its agreements include AS 2124-1992 and AS 4000-1997 General conditions of contract and AS 4300-1995 General conditions of contract for design and construct.

Standardised contracts are used by parties as a common and familiar starting point for contractual negotiations, and to enable the terms of subsequent agreement to be communicated in a common and familiar form to other stakeholders, such as banks and subcontractors. Sophisticated participants in the Australian contracting market (both on the principal side and the contractor side) have developed sets of 'standard' amendments which they seek to include in the various key 'standard' contracts to speed up efficient and reliable contracting outcomes.

These standardised contracts are the intellectual property of their publishers. Hence, when parties wish to use these standardised contracts they must pay the relevant royalty to the

publisher or ensure they have in place an adequate licensing arrangement for the relevant standard.

Project dispute resolution

Construction and infrastructure contracts in Australia frequently provide a prescribed method of dispute resolution. This generally involves one or several rounds of senior executive negotiation over required minimum time periods, followed by either binding arbitration, litigation or expert determination.

Binding arbitration remains a popular method of dispute resolution, particularly for projects with an international component or party. The seat of arbitration may be in Australia, but is frequently specified to be in an international arbitration centre, such as Singapore, Hong Kong or London. The decision, by some parties, to choose binding arbitration over court proceedings is often driven by the comparative ease with which arbitral awards can often be enforced overseas.

However, it is also common for participants in large Australian infrastructure projects to choose to have contract disputes ultimately decided by courts (whether Australian or otherwise) rather than arbitrators. This is because court dispute processes are often no longer or no more expensive (and are in some cases shorter and cheaper) than arbitration processes, with parties enjoying certainty of process and the ability of courts to make binding orders on related parties, such as to require disclosure of certain documents by non-parties.

It is also fairly common in Australia for parties to adopt binding expert determination in order to resolve certain types of disputes, often of a technical nature, in a relatively short timeframe.

Given the variety of dispute resolution options used on projects in Australia, it is important for parties to carefully consider the advantages and disadvantages of each form of dispute resolution, in relation to their particular contractual circumstances and priorities, at the time of contracting.

See Chapter 23 of this publication, 'Dispute Resolution', for more detail on dispute resolution.

Last updated: 01/03/2019

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