

Spotlight on: **Richard Wilkinson** Partner, Projects, Melbourne

Richard Wilkinson is a highly sought after front end construction and infrastructure specialist, based in Melbourne, Australia. Richard advises clients on the procurement of infrastructure and other economic assets. Richard shares with us an insight into his practice, the Australian market and some tips for foreign entrants in securing new deals in Australia.



Can you tell us about the sectors you operate across and the type of work you do with your clients?

One of the great things about my work is my varied practice across a number of industry sectors. My practice spans across four key sectors, being Roads and Transport, Commercial Developments, Defence Projects and Industrial Projects.

Typically, I spend around 60% of my time working with developers of infrastructure and other economic assets and around 40% working with companies seeking to tender to win the right to build that infrastructure and other economic assets.

My work involves advising clients on all aspects of the procurement of large scale developments, including drafting tender procedures and contractual project documentation, advising on how best to structure project and contractual arrangements and the impacts of legislation on those arrangements. On the flip side, I also advise clients on risks within tender documentation, and how to bid competitively and secure a deal.

You mentioned that you specialise in the Roads and Transport sector. Can you share with us a little about the status of that sector in Australia?

There is a lot happening right now in Australia across the Roads and Transport sector. Governments are keenly aware of the rapidly increasing population in capital cities, the forecast growth for the future and the economic issues associated with congestion on our roads and transport networks. The response by governments has been exciting. They are developing multi-faceted programs for future capacity and to alleviate congestion across our networks. We are seeing new roads planned and being built, and existing roads upgraded. This approach is combined with a focus on heavy rail, light rail and bus improvements across networks. The vast majority of the projects also have private sector involvement.

Another key issue facing government is the planned uptake of electric vehicles and the consequential hit to government revenue in the form of fuel excise. Governments are beginning to consider different models of road pricing - effectively considering the

introduction of a "user pays" system, which will not only assist to replace fuel excise revenue, but will also play a role in alleviating congestion. However, any "user pays" system needs to be backed up by first class alternative transport options, which explains the continued focus on improving transport across our capital cities. This means that there are plenty of future opportunities for private industry to be involved in this sector for many years to come.

Can you share with us what is happening in the Defence space in Australia?

We are seeing a huge investment by the Federal Government in defence assets and capability, driven by an aging war-time asset fleet and the continuously growing need to ensure homeland security.

The 2017 defence portfolio budget has listed 20 projects that the Federal Government will consider for first pass approval and 37 for second pass approval in the 2017-18 financial year. Key projects in which the private sector is involved include the SEA 5000 Future Frigates procurement (9 new warships), Land 4000 (multiple armoured vehicle replacement) and the

SEA 1000 Future Submarine procurement (12 new future submarines).

Interestingly, the sector is dominated by international contractors who are either tendering for projects in their own right or teaming with local contractors to boost their offerings. Thus, there are ample opportunities for international contractors with defence capability to expand their business in the Australian Defence sector. International contractors who commit to Australian local participation and growing a local skilled workforce within Australia over the course of a project often have a competitive advantage over those that do not.

What are the predominant procurement models in Australia and are standard form contracts widely used?

There is no easy answer to this question, as the procurement models that are typically used depend upon the sector and the value of the project.

On large government road and transport projects, we are still seeing “public private partnerships” (PPPs) as the predominant model. PPPs are a hybrid of “design and construct” and “operate and maintain” models in the one contract – essentially a “BOOT” (build, own, operate, transfer) model. There has also been a return to the “Early Contractor Involvement” and alliance models across some states for heavy rail projects. Whilst PPPs are common, we still don’t have a standard form suite of contracts that are in use. We do however have standard form alliancing agreements used by government – although these are still amended and negotiated, which removes some of the benefits of standard forms.

In the greenfield or industrial sectors, developers are most often using bespoke EPC (engineer, procure, construct) or D&C (design and construct) type arrangements. FIDIC is not widely used in the Australian market.

Within the commercial development sector, developers are most often using one of the standard form construction contracts published by Standards Australia, however it is rare that these are issued for tender without significant alteration.

The defence sectors also use their own forms of standard project documentation and the terms heavily favour the Department of Defence. Defence looks unfavourably on tenderers who seek to bid departures to standard form documentation. A key issue we are seeing with private Defence bidders is how to competitively bid on these documents whilst maintaining alignment with their standard corporate policies around contracting.

A lot of our readers are international. Have you got any tips for new entrants into the Australian market in terms of developing a winning bid on infrastructure projects?

The Australian market is ripe for new entrants. In fact, it is refreshing to see international consortiums becoming more prominent in our market and competing with Australian Tier 1 contractors and suppliers.

Probably the most important tip is to team up with a specialist law firm with a solid reputation in the relevant field, and which will assist bidders to balance their legal risk profile with their commercial offering.

One of two things tends to happen with foreign entrants:

1. They will compete aggressively on price, but heavily bid departures to project documentation to align with their corporate policies (from another market). This practice impacts on the developer’s perception of being able to swiftly strike a deal with that tenderer regardless of how competitive the tendered price. My tip is that the bidder should discuss with its Australian lawyer where the market is at on key risks and how best those risks can be managed without, in all cases, pushing them back to the developer.

2. The alternative is that they will compete aggressively on price and go extremely light on departures to project documentation. This may sound great in practice, but it also raises some suspicion. Developers put together contracts with a sense of where and on what issues they are prepared to bargain. They expect this process to occur. A clean bid tends to raise some suspicion as to whether the tenderer actually understands the risks it is accepting and whether they would be a suitable partner in the project.

The key, therefore, is to balance design, price and commercial terms. New entrants are best served by seeking expert advice from local lawyers in addition to relying on their corporate in-house counsel from foreign jurisdictions.

Can you share with us your passions in life?

I have a few of these.

Besides my passion for a good pizza on Friday nights, I have a wonderful family with two young children and I love to spend time with them.

Secondly, I love surfing. Time spent on the water is time to focus on nothing else but the waves and technique. It is a refreshing place to be – somewhat akin to a state of meditation.

Last but not least, I love my work, the nature of the projects I get involved with and the energy and enthusiasm from my clients. My passion is to drive my career into the future, where I am involved with the merger of infrastructure projects and technological advancements.

Get in touch

T +61 3 9288 1478
richardA.wilkinson@hsf.com

[herbertsmithfreehills.com/
 our-people/richard_wilkinson](http://herbertsmithfreehills.com/our-people/richard_wilkinson)