# THE PROJECTS AND CONSTRUCTION REVIEW

TENTH EDITION

**Editor**
Júlio César Bueno

THE LAWREVIEWS

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# PREFACE

*La meilleure façon d'être actuel, disait mon frère Daniel Villey,*
*est de résister et de réagir contre les vices de son époque.*
Michel Villey, *Critique de la pensée juridique modern* (Paris: Dalloz, 1976)

This book has been structured following years of debates and lectures promoted by the International Construction Law Committee of the International Bar Association, the International Academy of Construction Lawyers, the Royal Institution of Chartered Surveyors, the Chartered Institute of Arbitrators, the Society of Construction Law, the Dispute Resolution Board Foundation, the American Bar Association's Forum on the Construction Industry, the American College of Construction Lawyers, the Canadian College of Construction Lawyers and the International Construction Lawyers Association. All these institutions and associations have dedicated themselves to promoting an in-depth analysis of the most important issues relating to projects and construction law practice and I would like to thank their leaders and members for their important support in the preparation of this book.

Project financing and construction law are highly specialised areas of legal practice. They are intrinsically functional and pragmatic, and require the combination of a multitasking group of professionals – owners, contractors, bankers, insurers, brokers, architects, engineers, geologists, surveyors, public authorities and lawyers – each bringing their own knowledge and perspective to the table.

I am glad to say that we have a chapter from Turkey in this edition. Although there is an increased perception that project financing and construction law are global issues, the local knowledge offered by leading experts in 19 countries has shown us that to understand the world, we must first make sense of what happens locally; to further advance our understanding of the law, we must resist the modern view (and vice?) that all that matters is global and what is regional is of no importance. Many thanks to all the authors and law firms that graciously agreed to participate.

Finally, I dedicate this tenth edition of *The Projects and Construction Review* to a dear friend, the late Vinayak P Pradhan, who died on 8 March 2020. Vinayak Pradhan was an advocate and solicitor of the High Court of Malaya and the Supreme Court of Singapore. He was a partner and consultant at Skrine for more than 45 years, recognised throughout his legal career as a talented advocate, whose oratorical brilliance regularly outshone the best and was immensely respected in the arbitration world. Vinayak was appointed director of the Asian International Arbitration Centre in November 2018. The then Honourable

Attorney General of Malaysia, in announcing the appointment, described Vinayak as 'the doyen of arbitration in Malaysia and recognised the world over for his ability, experience and leadership in the field of arbitration'. He is survived by his wife, Varsha, and his two children, Avinash and Anisha.

**Júlio César Bueno**
Pinheiro Neto Advogados
São Paulo
June 2020

**Chapter 5**

# AUSTRALIA

*Matt Bradbury, Evan Economo, David Gilham, Wei Lim, Strati Pantges, Andrew Bukowski and Xavier Milne*[1]

## I INTRODUCTION

Australia is a dynamic and commodity-rich nation, whose wealth of natural resources has historically created opportunities for the government and corporations to embark upon major infrastructure and construction projects. The country's approach to infrastructure development during the past 15 years has been focused on access to commodities for export and alleviating transport congestion in major capital cities. However, in recent years, the Australian market has seen a boom in the number of renewable energy projects being released to the construction sector. This increase in activity has been assisted by government but largely market-led through a combination of high power prices and the rapidly falling cost of enabling technology. With this increased activity, there has been a push by the construction sector to upskill and take advantage of this burgeoning market.

Over the past five years as a number of the major project works relating to traditional mining and gas developments have progressed well into the operational phase, there was a decrease in new project development and associated construction. But with the worldwide focus on diversifying the source of 'battery minerals' such as vanadium, scandium and cobalt, Australia has seen an increase in public and private sector appetite for exploring and developing these essential mineral projects. While the mining sector is redefining its focus significant federal, state and local government funding has been directed towards filling the gap with on urban transport and renewal projects in the metropolitan centres. Coupled with this is a resurgence of the tourism sector and private sector funding, particularly from Asia into the cultural sector.

This rebalancing brings opportunities for the construction sector to shift its focus towards renewables, infrastructure (such as road, rail and telecommunications projects) and tourism, which, in recent years, have not attracted the investment required to cater for increased population growth. By 2033, it is projected that more than 30 million people will call Australia home. All levels of government are therefore assessing requirements of the community across the country, with a number of multibillion-dollar nation-shaping projects currently being undertaken, predominantly relating to urban congestion and national and regional connectivity. These include large metro and light rail projects in the capital cities, the roll-out of the National Broadband Network, and improved airport and port access for new freight links.

1 Matt Bradbury, Evan Economo, David Gilham and Wei Lim are partners, Strati Pantges is a special counsel and Andrew Bukowski and Xavier Milne are senior associates at McCullough Robertson. Liam Davis, Eva Vicic, Louise Horrocks, Stephen White, Erika Williams and Bethany Du from McCullough Robertson also contributed to the chapter.

Australia has a sophisticated legal and regulatory framework in place to govern such projects and their proponents. It remains a jurisdiction in which projects can be completed with minimal sovereign risk and therefore is still an attractive destination for foreign investment.

Any discussion about Australia's legal and regulatory landscape must be prefaced with an explanation of its status as a federation. Australia consists of six states (Queensland, New South Wales (NSW), Victoria, South Australia, Western Australia and Tasmania) and two self-governing territories (the Australian Capital Territory (ACT) and the Northern Territory). Each state and territory has its own legislative, judicial and executive arms of government. There are three levels of government in Australia: federal, state and local.

The legislative powers of the federal government are constrained by the Australian Constitution and include subjects as diverse as corporations, defence, taxation, telecommunications, immigration, foreign affairs and trade. The state governments have unfettered legislative jurisdiction, subject to the constitution and qualification that federal legislation will prevail over state legislation to the extent of any inconsistencies. Local governments are primarily responsible for planning and development, and the provision of local services to communities.

Australia has a common law system, which it inherited from the United Kingdom. Each state and territory has its own courts, appeals from which may be heard in the High Court of Australia. There are also federal courts that hear matters arising under federal laws.

## II THE YEAR IN REVIEW

Construction activity in Australia remains a key pillar to the Australian economy. The real game changer in Australia during the past several years has been the widespread public acceptance of renewable energy as key part of Australia's climate change response, which has seen an increase in support at both federal and state government levels, creating more certainty for industry and in turn a greater appetite for investment. In September 2019, the Clean Energy Regulator announced that Australia had, a year early, met its renewable energy target to source 33,000 GWH of electricity from renewable sources by 2020.

Much of the talk about energy is largely the result of the steady rise in Australia's population and how the major cities will cope with the forecast growth. During the past year, there has been significant government and private investment in social and transport projects. Three kilometres of George Street in Sydney is occupied by building sites, including a major extension of the A$2 billion Sydney Light Rail network through the city and to the eastern suburbs, which is due to be completed in 2019. Similarly, the Gold Coast Light Rail network is preparing to undergo its second successive expansion at a total cost of over A$700 million to be jointly funded by local, State and federal government contributions. Light rail (trams), which was once Australia's most popular form of public transport before the car, is now back in vogue as the Australian and various state and local governments try to move personal vehicles off roads in the central business districts (CBDs) and encourage commuters to use efficient public transport networks.

Rail construction as a whole has seen a revival, with significant projects aimed at creating increased connectivity between capital cities and outer suburbs, such as the 12.6-kilometre Moreton Bay Rail Link in Queensland and Australia's largest public transport project to date – the A$12 billion Sydney Metro, which involves the underground construction of rail lines covering 75 kilometres. Construction is progressing on the A$2 billion Forrestfield

to Perth rail link, which will connect Forrestfield to the city, opening up Perth's eastern suburbs to the rail network for the first time. In Brisbane, known as the River City, work has begun on the long-awaited Cross River Rail, which will be an underground rail line through central Brisbane. The A$5 billion project involves building a 5.4-kilometre tunnel under the Brisbane River and the Brisbane CBD, creating five new inner-city station precincts. Nationally, following market testing, a new key piece of major freight infrastructure will be constructed that will link Melbourne to Brisbane via central-west NSW and Toowoomba, a significant investment by the federal government for this A$13 billion Inland Rail project. The project will comprise 13 individual projects and will span more than 1,700km when complete. In April 2018, the government promised A$5 billion for a Melbourne airport train line to expedite the commute from the airports to the CBD.

Capital city congestion is a clear priority for the federal government, which is evidenced by the allocation of A$100 billion in the 2019 Federal Budget to be spent on infrastructure during the next decade. It is proposed that the federal government will co-fund a high-speed train service between Melbourne and Geelong in the State of Victoria, cutting travel time by about half thanks to trains proposed to travel at an average speed of 160kph The federal government will also fund business cases for high-speed train services between Sydney and Wollongong and Sydney and Parkes in NSW, Melbourne to Albury-Wodonga and Melbourne to Traralgon in Victoria and Brisbane to the Gold Coast in Queensland.

Australia's road network has also received significant funding to deal with increased traffic congestion. WestConnex in Sydney involves widening and extending the M4 Western Motorway, a new section for the M5 South Western Motorway and a new bypass of the Sydney CBD connecting the M4 and M5. These projects will build or upgrade approximately 33 kilometres (predominantly underground) of the Sydney motorway network with an estimated value of A$20 billion. There are also major upgrades of the Pacific Highway between Sydney and Brisbane taking place. In Melbourne, the A$1.34 billion widening of the Tullamarine Freeway and Citylink (one of Melbourne's most heavily used roads, carrying approximately 210,000 vehicles per day) is now complete and the North East Link Project, which will connect the city's M80 ring road and M3 freeway at an estimated cost of A$10 billion to be the biggest road project in Victoria's history, is about to get underway with expected completion in 2027.

This theme of connectivity through social infrastructure is helping to shape the Australian construction sector. Telecommunications provides an obvious example of this as the roll-out of the National Broadband Network continues with more than five million activations. This A$50 billion project is delivering Australia's first national wholesale-only, open-access broadband network to all Australians.

It has been important for the construction sector to have these nation-building government-funded projects as the residential building sector starts to plateau, given the massive increase in multi-unit dwelling construction during the past five or so years. However, this does not mean that building projects have declined. In Victoria, the Fisherman's Bend Framework was released in October 2018. With plans to develop 485 hectares of land in inner Melbourne, it is expected to be Australia's largest urban renewal project, the aim of which is to provide housing for 80,000 residents by 2050. Community engagement took place in mid-2019 with a summary to be available soon. The Burwood Brickworks Apartment project is also moving forward which, when completed, will include a 13,000m$^2$ dining and entertainment precinct anchored by more than 40 specialty shops.

In NSW, the next stage of the Barangaroo commercial, residential and parkland development, set to complete in 2024, has created what could be seen as a satellite CBD on the edge of the current CBD and the next stage will include Sydney's first six-star hotel and casino which is currently under construction as well as a Metro station. Sydney's other major urban renewal project, one of the largest in the world – The Bays – lies two kilometres west of the city and consists of 95 hectares of largely government-owned land that is being transformed into a technology hub, among other uses. It is anticipated that Infrastructure NSW will consult the community on the master plan option in 2020. There is also what can only be described as the creation of whole new suburbs on former industrial land in some cities, such as Sydney's first new town centre in almost 100 years – Green Square, 4.5 kilometres from the CBD – and in Brisbane, the Newstead commercial, retail and residential development on the site of a former gasworks. Construction has also started on the Queen's Wharf project in the CBD in Brisbane, which is the development of a wold-class entertainment precinct covering more than 26 hectares across land and water in the heart of the Brisbane.

Particular mention should be made of western Sydney, which is a major growth area, for which the federal and NSW governments are funding a 10-year, A$3.6 billion road investment programme. The Western Sydney Infrastructure Plan will deliver major road infrastructure upgrades to support an integrated transport solution for the region and capitalise on the economic benefits from developing the proposed Western Sydney Airport at Badgerys Creek. Western Sydney also has the A$2 billion Parramatta Square redevelopment. There is an acceleration of greenfield developments and new town centres, such as Frasers Properties' Ed. Square development in Edmondson Park, which, as well as a residential component, also includes retail, entertainment, marketplace, playgrounds and parklands. The first stage of the development is due to complete in 2020. In Liverpool, the gateway city to Western Sydney Airport, there is a plan to create Sydney's third CBD. There is more than $1 billion worth of large mixed-use developments in the pipeline for the city of Liverpool. These include the 25,000m$^2$ Liverpool Quarter office tower and separate plans by the Uniting Church and private landowners for a 3490m$^2$ site near Elizabeth and Bigge streets in the CBD, and a pledge by the local government to contribute A$75 million towards the redevelopment of Liverpool Civic Place. The Western Sydney Aerotropolis is one of Australia's most transformational infrastructure projects, and will become a thriving economic hub in the heart of Western Sydney.

Another major geographical growth area has been, and will continue to be, the Northern Territory. Current and recently completed major projects include the Darwin luxury hotel development; the Darwin Port lease; the Icthys LNG project; the Mount Isa to Tennant Creek railway project; the Northern Gas Pipeline; the Palmerston Regional Hospital project; and the Royal Darwin Hospital Expansion project. The Australian and Northern Territory governments, together with the City of Darwin, are partnering on the Darwin City Deal, a 10-year development plan to revitalise Darwin's city centre through (among other things) a new Education and Civic Centre and the redevelopment of State Square and Darwin's harbour foreshore (other City Deals have been signed for Townsville, Launceston, Western Sydney, Hobart, Geelong and Adelaide and recently announced for Perth and South East Queensland). The federal government's A$5 billion loan programme to support infrastructure projects in northern Australia combined with the Northern Territory White Paper, which sets out a policy platform for realising the full economic potential of northern

Australia, also promises to create exciting opportunities for economic development. The Northern Territory strategically benefits from physically neighbouring the Asian economies and is well positioned as a transport and logistics hub for business and tourism.

With the Australian dollar continuing to trade much lower against the US dollar than in previous years and Queensland's second-largest city, the Gold Coast, having hosted the 2018 Commonwealth Games, there has been a revival in the tourism and cultural sectors across Australia. About 4,600 rooms will be added to the Sydney hotel market alone by the end of 2022. Work is continuing on IHG's Holiday Inn Sydney Central, which will be a 305-room hotel developed by China's Linzhu group in the Central Park precinct at the southern end of the CBD, set to open in 2020. Development is also underway for the W Hotel Sydney, the 5-star hotel will have more than 400 rooms and is a part of The Ribbon development on the old IMAX site at Darling Harbour. A number of other luxury hotel developments for 2020 include the Ritz-Carlton at the Star Casino, and the Porter House Hotel in the Sydney CBD as part of a mixed-use development. This includes the redevelopment of Gold Fields House, Fairfax House and the rugby club at Circular Quay in Sydney into a five-star hotel tower and mixed use residential tower. In Queensland, the Jewel development on the Gold Coast, will comprise of three towers, including a five-star hotel with approximately 170 rooms and more than 500 residential apartments as well as high-end retail spaces. Jewel is the first beachfront residential resort to be constructed on the Gold Coast in more than 30 years. Work is continuing on IHG's Holiday Inn Sydney Central, which will be a 305-room hotel developed by China's Linzhu group in the Central Park precinct at the southern end of the CBD. Nowhere in Australia is tourism helping to shape the skyline more than in Australia's 'new world city', Brisbane, where Star Entertainment Group, Far East Consortium (Australia) and Chow Tai Fook Enterprises are facilitating the delivery of the Queen's Wharf Brisbane integrated resort development, where work started in 2017. The development includes five new premium hotel brands, including, notably, the Ritz Carlton and Brisbane's first six-star hotel.

Developments are also continuing to ramp up in regional cities, such as Newcastle. Over the last few years Hunter and Central Coast Development Corporation has continued to sell Government owned land to the provide sector around the Newcastle and Central Coast business centres to enable the land to be developed for commercial and residential purposes and to revitalise the city centres. This has included the sale of land to the Newcastle University to enable the expansion of the inner city campus to facilitate increased connection between university students and the business community.

North Queenslanders have been waiting decades for a new stadium in Townsville to host rugby league games and construction of the stadium known as Queensland Country Bank Stadium completed in 2020. Further, the Cowboys rugby league team in Townsville have obtained Commonwealth grant funding to commence construction of a high performance training complex with completion expected in 2021. In Perth, the construction of Perth Stadium and Sports Precinct has concluded. Cranes from large building projects are casting shadows across the skylines of Australia's capital cities: from the A$1.2 billion Perth New Children's Hospital to the A$700 million Darling Harbour hotel known as The Ribbon, which is being built between the ramps of the Western Distributor Freeway. There is also the demolition and rebuild of the Sydney Football Stadium at Moore Park, the refurbishment of the ANZ Stadium at Sydney Olympic Park and the completion in 2019 of a new 30,000-seat stadium at Parramatta.

The rapid development of the Australian renewable energy sector has been largely driven by increased foreign investment and general private sector development. This Includes the Port Augusta development led by DP Energy Australia, a combined solar and wind renewable energy project, estimated to generate approximately 1,000 GWh of clean renewable energy into the national electricity grid per year. Construction on the project is expected to commence in 2020. We are even seeing major international resource houses that have traditionally worked in the coal sector moving into renewable energy. Indian energy giant Adani, for example, now has one fully operational 65MW solar farm near Moranbah in central Queensland and is continuing to develop a further 140MW solar farm on the northern outskirts of Whyalla in South Australia. Off-grid mines are also turning to renewables solutions, with Gold Fields commissioning EDL Energy to build, own and operate a renewables 'microgrid' consisting of solar, wind, battery and gas components to power operations at it is Agnew Mine in Western Australia. Australian universities have also embraced the uptake of renewables, with the University of Queensland (UQ) committing to offset 100 per cent of its energy consumption with renewable technology. UQ's first major step towards this has been embarking on the construction of a 64-megawatt solar project outside Warwick in south-west Queensland due to be completed by the end of 2020. This expansion into the energy sector by non-traditional players is being replicated by local governments, property developers and hospitals across Australia.

The energy debate in Australia has largely focused on the intermittency risk associated with generating solar and wind power. This has lead to more solar and wind power developments incorporating a battery component such as AGL Energy's and Vena Energy Australia's Wandoan Project in Queensland. The Wandoan Project will have an initial capacity of 100MW of renewable energy and store 150MW. There is also a trend in federal and state policy frameworks towards promoting the development of 'Renewable Energy Zones' that aim to unlock the renewables potential of key regions through investment in transmission network infrastructure to address grid capacity and stability issues. The centrepiece of the federal government's energy policy is the construction of Snowy Hydro 2.0, which will add 2,000 megawatts of pumped hydro energy generation to the Snowy Mountains hydroelectricity facility, providing storage for the network to assist when solar and wind facilities are not generating enough electricity at peak periods. This significant project is government-funded and is an example of the continuing public investment in non-resources infrastructure. This is not to say that resources projects have completely dried up. In fact, some of the largest mining projects in the world are under construction or about to start development in Australia. For example, Adani's Carmichael Coal project is being constructed as a 60 million tonne (product) per annum coal mine, including both underground and open-cut mining. Coal will be transported to port facilities via a privately owned rail line that is connected to the existing rail infrastructure.

It is clear that, during the past year, Australia's infrastructure sector has become more balanced, with a much greater range of projects across roads, rail, renewables and commercial building. The outlook for the sector remains bright, although there is a level of uncertainty caused by the covid-19 pandemic. While, at present, there are no general restrictions or shutdowns operating on the sector, significant disruptions have been caused by supply chain interruptions, travel restrictions and even social distancing measures (i.e., as they relate to work on site). While some projects have been deferred, others have been accelerated, including some government-sponsored projects that are hoped to provide a fiscal boost to counter the economic downturn which has accompanied the spread of the virus. Only time

will reveal the full impact of the pandemic on the sector, but the current sentiment generally regards these disruptions are as being temporary in nature and unlikely to undermine longer term industry trends.

## III DOCUMENTS AND TRANSACTIONAL STRUCTURES

### i Transactional structures

Corporations undertaking projects physically located in Australia would normally use one or more Australian-resident companies as the primary participants, particularly for the owners and operators of assets, but also for major contractors involved in construction.

If there is a sole project owner, separate Australian subsidiary companies may be used by the project owner to conduct different aspects of the project. For example, separate subsidiaries may own the project assets, act as a financing vehicle to hold internal or external debt to fund the project and employ labour. Similarly, in certain projects, it is common to have a separate operator that outsources some or all of the day-to-day operations to third-party service providers.

The use of separate corporate entities in an onshore Australia group structure may facilitate the limitation of liability, ring-fence specific risks, simplify project financing and meet other commercial objectives.

#### *Joint venture structures*

A project that has multiple equity investors may commercially be referred to as a joint venture. A joint venture can encompass a wide range of legal structures. A joint venture structure can take the form of an incorporated joint venture, which involves one or more special purpose project companies, the shares in each of which are owned by multiple equity investors in the same proportions. In such cases, relations between the shareholders and their conduct would be governed by a contractual shareholders' agreement.

Under the Australian taxation system, an incorporated joint venture company or corporate group cannot be treated as a pass-through entity. As a result, the losses and depreciation of an incorporated joint venture or structure are trapped within the entity or structure. While some Australian states allow for the formation of limited partnerships, they are taxed at the same rate as corporations (currently 30 per cent).

#### *Unincorporated joint ventures*

An unincorporated joint venture structure is most often used when there is a desire for a flow-through of gains, losses and depreciation to underlying owners. This is of particular importance when an investor has other Australian interests and there is a desire to offset taxable profit, losses and deductions from different projects in which the investor has an interest.

Unincorporated joint ventures are particularly common in the mining and oil and gas industries. It is a commonly understood structure and is familiar to investors, local advisers and regulatory authorities, as well as to banks and project financiers.

In mining joint venture structures, each unrelated participant will undertake to contribute, by way of cash calls, its proportion of the relevant costs of developing and operating a mine. A separate corporate manager (often owned by the participants in the same proportions as their interest in the joint venture) would normally be appointed to undertake the day-to-day activities of the project as agent for the participants. Each participant then

takes its share of the output from the mine and, depending on the contractual terms, may have an ability to deal with it separately. In some cases, though, each participant will appoint the same sales agent (also often a corporate vehicle owned by the participants in the same proportions as their interest in the joint venture) to sell its share of the product to third parties.

Under a unincorporated joint venture structure, each participant includes in its own tax calculations its share of the costs and depreciation deductions of the project and separately accounts for its own proceeds from the sale of the product.

If it is not feasible to take a separate share of the output of the relevant project (such as the construction of an infrastructure asset that has a single revenue stream), an unincorporated joint venture will be considered to be a partnership for tax purposes and a separate return is required to be lodged on behalf of the joint venture. However, there is a flow-through of the income or loss from the project if this is the case.

***Infrastructure trusts***

Another structure commonly used when there are multiple investors in an infrastructure asset with a positive cash flow and income stream is a fixed unit trust. This type of trust facilitates the distribution of free cash in excess of the taxable income of the project, without immediate tax consequences for investors when, for example, the tax income is partially sheltered by depreciation or capital works deductions for infrastructure.

**ii Bespoke and standard form contracts**

Traditionally, projects within Australia have been undertaken pursuant to standard form contracts published by Standards Australia. These standard form documents have been heavily amended over time to reflect the decisions that have been handed down by the courts.

While Standards Australia contracts remain the most commonly used agreements for large commercial projects within Australia, as a result of the increasing involvement of international engineering-procurement-construction-management (EPCM) contractors on major projects, the contractual landscape has been modified. There have been more imports of bespoke contracts that reflect the contractual environment of the EPCM contractors' home jurisdictions.

***International Federation of Consulting Engineers contracts***

Despite a high degree of enthusiasm within the legal profession and industry bodies, the International Federation of Consulting Engineers (FIDIC) suite of standard form contracts is yet to be fully embraced in Australia. Instead, FIDIC contracts tend to be used by foreign companies engaging in business in Australia and by Australian-domiciled companies who have had exposure to the contracts as a result of their involvement in projects overseas. FIDIC contracts are commonly used on projects being undertaken in South East Asia.

***New Engineering Contract Suite***

The New Engineering Contract Suite (NEC) suite was first published in 1993. It has been through a number of iterations and has seen increasing use in Australia in recent years given its focus on collaborative contracting styles and the decreasing appetite for traditional delivery models. The NEC3 suite was recently used by Main Roads Western Australia to deliver a works package for a highway upgrade project and also by Meridian Energy (New Zealand's larges renewable electricity generator) to deliver the A$260m Mt Mercer 131MW wind

farm in Victoria. Sydney Water (Australia's largest water and wastewater service provider) has also recently announced that it will use the NEC4 suite to support the rollout of its new 'Partnering for Success' procurement strategy. On the whole though, uptake of the NEC suite in Australia still remains relatively low.

## IV RISK ALLOCATION AND MANAGEMENT

Limitation of liability clauses are commonly incorporated into contracts as a method of managing risk.

Contractors will generally seek to limit their liability by including caps in their contracts both on aggregate liability and on the amount of liquidated damages that may be levied against them in the event of late completion (the liquidated damages cap being generally between 5 and 10 per cent of the overall adjusted contract sum).

It is also common for parties to limit their liability in respect of consequential loss to avoid becoming exposed to claims, for example for loss of profits, loss of use, loss of production and loss of revenue that may result from the way in which they conduct or administer a project. In the Australian context, it is very important to identify the types of losses that are being excluded rather than use the term 'consequential loss', as the legal meaning of that term is far from settled in the various Australian jurisdictions and does not correspond to the equivalent meaning under English law. These provisions are particularly important in the mining and resources sector because of the extent of the losses that can be caused by the shutdown of a mine, processing facility or associated rail infrastructure and the associated loss of production.

## V SECURITY AND COLLATERAL

Secured transactions are primarily governed by federal law in Australia; however, for transactions involving certain rights and industries (for instance, mining rights or land) transactions are additionally regulated by state legislation. Legislation between each state differs, but there are often substantial similarities.

In 2012, Australia introduced a national personal property securities regime similar to that already in place in Canada, New Zealand and some parts of the United States. The regime allows for, and in some instances requires, the registration of security interests in personal property on a public national database, which replaced numerous state and territory based registers. The definition of 'personal property' extends essentially to any property other than land, with some limited exceptions.

The legislation relies on the concepts of attachment and perfection in determining whether a security interest has been created. For a security interest to be enforceable against the grantor, the security interest must attach to the personal property being offered as collateral. Attachment occurs where the secured party is given value, the grantor has a transferable interest in the collateral and the grantor and secured party enter into a security agreement or the secured party has possession of the collateral. The interest must ordinarily then be perfected to allow the secured party to obtain priority against third parties. Perfection can occur by registration (the most usual method), possession or control (with the concept of control only being relevant to certain limited assets, such as shares).

Unsurprisingly, the regime affects the structuring of financing arrangements and investments and the operations of contractors (foreign and national alike) in Australia. A

lender taking security over Australian shares and assets (including income or contracts) will need to consider this regime carefully when structuring their lending arrangements in Australia. However, a wide range of standard contractual arrangements, outside the finance arena, are also potentially affected by the legislation.

Contracts under which rights to obtain property arise on default (e.g., step-in rights). Supply contracts with retention of title clauses, deferred-payment arrangements, subcontracting arrangements, equipment hire and leasing arrangements, and joint ventures and shareholder agreements all potentially involve the granting of security interests, which may necessitate the registration of that interest for it to be enforceable against third parties. The regime also affects the holder of the legal title to the relevant assets if the holder has given up possession of the relevant asset: the owner's title to that asset can be defeated by others, for example by third parties with a registered security interest in the property, third parties taking free of the owner's interest or on the insolvency of the grantor when the security interest has not been perfected.

The personal property securities regime is a relatively new area of law and there is ongoing debate in Australia as to whether certain interests will (or will not) amount to 'security interests' for the purposes of this regime. This will only be resolved by court consideration and legislative clarification over time. Until this doubt is resolved, there is an inherent risk that secured parties who do not adequately protect their security interest under the personal properties securities regime may lose their interest in the relevant goods to others who have adequately protected their interest under the regime. In an example of the evolving jurisprudence in this area, and an illustration of the risks incurred by owners of property who are leasing or hiring out that property to third parties and who do not adequately protect their interests in that property under the personal property securities regime, the NSW Court of Appeal recently held that the ownership interest of the owner and lessor of four mobile turbine generator sets, which had not registered its interest (under the lease arrangements) in those turbines, vested in the lessee of those turbines immediately before the lessee entered into administration. Accordingly, the lessee (and its secured creditors, who had registered their security interests over the assets of the lessee) had better title to the turbines than the owner and lessor.

Ownership of land is recorded by a registration system known as the Torrens Title system. Each state and territory administers its own Torrens Title register for land situated in its jurisdiction. The main object of the system is to make the register conclusive (subject to limited exceptions, such as fraud). Owners and other interest holders can prove their 'title by registration', searchable on a public database, which is a pivotal concept of the system. For financiers, the system ensures that as a registered mortgagee on title, the financier has certainty regarding its security interest over the land at the exclusion of other unregistered competing security interests. If there is more than one mortgage registered on a land title, the order of registration on the title determines priority (unless contractually modified between the mortgagees).

## VI BONDS AND INSURANCE

In the Australian construction industry, security is generally given by contractors and subcontractors to parties above them in the contractual hierarchy. The Australian Standard suite of contracts contain provisions that allow for the bilateral granting of security, but this is rarely seen in practice.

Typically, bank guarantees and, on large-scale projects, performance bonds are given by contractors and subcontractors to secure the performance of their contractual obligations (including the rectification of any defective work for an agreed term following the completion of the project, referred to as the defects liability period or maintenance period).

These instruments are irrevocable and commonly provided on an unconditional basis (although they can also be provided with attached conditions), meaning that they are effectively as good as cash in the hands of the beneficiary and can simply be presented at the issuing financial institution and converted without first obtaining the consent of the party who provided them.

While courts are generally hesitant to restrain a party from having recourse to the security it holds, they are prepared to grant injunctions in certain, limited circumstances (such as fraud, or where an unconscionable attempt is made to have recourse to security that would cause damage to the reputation of the party who provided it). There have been a number of court decisions considering the issue of security for performance and, by extension, the notion that security requested under a construction contract is regarded as a form of risk mitigation in the event that there is a dispute at the conclusion of a project.

Although some construction contracts provide for cash retentions to be deducted from progress payments that are made to contractors and subcontractors, these arrangements are uncommon on large-scale projects because of the effect they may have on the contractor's cash flow.

In some Australian jurisdictions, legislative provisions have been enacted to restrict the amount of security that a party to a construction contract may lawfully require another to provide, as well as the circumstances in which recourse may be had to the security that is withheld. In NSW, head contractors on projects whose value exceeds A$20 million are required to establish trust accounts into which retention monies that are withheld from subcontractors must be deposited.

Under most contracts, a proportion of the withheld retention or security will become due for release when the works reaches completion, with the balance becoming due following the expiry of the defects liability period (assuming that it has not been called upon prior to this date).

Similar to the Grenfell Tower fire in London in June 2017, there was a significant fire at the Lacrosse Tower in Melbourne in 2014, involving aluminium composite panels on the exterior of a building. Fortunately, and unlike the Grenfell incident, no lives were lost. However, the Lacrosse Tower fire has significantly affected the construction insurance market in Australia following the recent determination of a litigated claim involving that incident.

The owners of the Lacrosse Tower succeeded in recovering substantial damages against the original builder, who had installed non-compliant aluminium composite panels on the exterior of the building – this caused the rapid spread of a fire that had started because of a cigarette butt carelessly discarded by a resident. In turn, the builder was able to shift almost the entirety of its liability for the claim to the building consultants who were engaged to design and certify the construction of the building, including the architect, the building surveyor and the fire engineer, all of whom failed either to select appropriate cladding or to ensure that the selected cladding material was compliant.

Notwithstanding this decision, the outcome of which turned largely on the contractual relationships between the builder and the design and certification consultants, it remains difficult for parties affected by the use of non-compliant cladding to establish the existence of a duty of care in a claim for negligence for pure economic loss in the Australian jurisdiction.

The reaction of insurers to the crystallisation of risks associated with non-compliant cladding has been as swift as it has been predictable: cover for construction contractors and consultants who may have been involved in projects using both compliant and non-compliant cladding is now particularly difficult to secure, as it is for building owners corporations. In addition, recent poor claims experience in the Australian and London construction insurance markets, preceded by a lengthy period of excess insurance capacity and competition among insurers for market share, has now seen a sharp reversal in the availability of all lines of commercial cover. It is expected that it will take some time for the market to stabilise.

## VII ENFORCEMENT OF SECURITY AND BANKRUPTCY PROCEEDINGS

The Australian regime for security enforcement and bankruptcy proceedings is based on, and is similar to, the jurisdiction in the United Kingdom. Secured lenders in Australia, however, retain the right to appoint a receiver over all the assets of a security provider (obligor) upon a default (contrast for instance, the United Kingdom, where the right to appoint administrative receivers (as they are referred to there) has been removed for security documents dated on or after 15 September 2003). Despite this, the appointment of receivers is now increasingly rare and only done as a last resort.

A secured lender would usually enforce its rights as a secured lender first by negotiation with the obligor with a view to satisfactory arrangements being reached as to the restructure or refinance of the secured debt. If those negotiations do not result in a satisfactory outcome, the action the secured lender takes next will depend on the nature of the lender. Most secured lending in Australia is provided by banks. The banking sector has been under great scrutiny by way of various parliamentary inquiries and more recently a Royal Commission. This has led to banks being extremely reluctant to do anything (such as enforcing their security) that could lead to negative publicity. Therefore, if a secured lender is a bank, rather than taking steps to enforce its security, the bank is likely to freeze further lending or demand repayment of the secured debt with the knowledge that is likely to make the obligor insolvent (because of its inability to repay the secured debt when demanded) and wait for the directors of the obligor to place the obligor in a formal insolvency process, such as administration or liquidation (as discussed below), which they would do to avoid personal liability for trading the obligor while insolvent. Only when the obligor is in administration or liquidation would a bank be likely to appoint receivers. If the lender is a non-bank lender who is not subject to such high levels of public scrutiny, the lender is more likely to enforce its security earlier.

When a secured lender appoints a receiver during an administration or liquidation, the receiver controls the secured assets rather than the administrator or liquidator. A receiver acts in the interests of the secured lender that appointed it and will take such steps as are necessary to recover the secured lender's debt (usually by selling the secured assets).

Secured lenders can also enforce their security over collateral by taking possession of it and selling it themselves. Possession can be taken without a court order if an obligor does not take steps to make peaceful and lawful repossession possible. Once the secured lender has possession of the collateral, the secured lender must comply with obligations placed upon it by both federal and state legislation when realising it.

The ranking of priority between secured lenders with security over the same collateral is generally determined by the order of registration of the security on relevant statutory registers or by agreement between the lenders. Secured lenders have priority over all unsecured

claims (including tax liabilities) other than employee claims, which have priority over the proceeds of circulating assets (i.e., cash, inventory and debtors that are not controlled by the secured lender).

The ability of secured lenders to enforce their security has been affected by the introduction of laws that prevent secured lenders relying on contractual rights (such as a right to enforce) in contracts entered into after 1 July 2018 that arise solely because a company goes into receivership, administration or an insolvent scheme of arrangement. These are commonly referred to as *ipso facto* rights. However, these laws do not prevent secured lenders enforcing their security if there are other events of default (such as repayment defaults or covenant breaches), which commonly will be the case.

The two main formal corporate insolvency processes in Australia are administration and liquidation. Administration allows an independent qualified insolvency practitioner to take control of the operations of a company with a view to attempting to restructure its affairs via an arrangement agreed with its creditors (similar to a plan of reorganisation in the United States under Chapter 11, without the need for court approval). Secured lenders with security over the whole or substantially the whole of an obligor's property can also appoint an administrator to the obligor. Liquidation is a terminal insolvency process whereby the liquidator winds up the company's affairs and distributes any surplus after the costs of the liquidation to the creditors and (rarely) shareholders.

## VIII SOCIO-ENVIRONMENTAL ISSUES

Australia enjoys a stable commercial climate in which to conduct project development. That said, greater scrutiny of a company's social licence to operate continues to drive reform by government and innovation by companies. This section details what businesses involved in projects and construction may expect at the state and national levels of Australian government, and commonly recognised international standards relevant to project finance.

### i Business expectations from state-level government

State governments throughout Australia are the primary assessment and approval authority for new projects. In some circumstances, driven by the location of a project and the nature of its impacts, further assessment at the federal level may be triggered. That said, efforts continue to avoid duplication and establishing a 'one-stop shop' for environmental assessments.

As part of a routine environmental impact assessment process for a significant project, independent environmental state government agencies are responsible for assessing environmental management and third-party stakeholders are invited to comment on the impacts. This allows landholders and interest groups to have their say on proposals and developments, adding motivation to ensure that early and effective stakeholder engagement is in place. Emissions and renewable energy policy tends to be driven from a state level, influencing national action. Precipitated by significant energy events, such as the major outages in South Australia and calls from industry for government to address rising costs and availability issues, state governments have set renewable energy targets and are increasing their focus on large-scale renewable energy delivery developments.

With vast renewable resources remaining largely untapped, significant inbound investment in renewables is occurring, although there remains scope to increase this interest to meet the state energy targets. Almost all states have now set individual renewable targets. This includes 40 per cent by 2025 for Victoria, and 100 per cent by 2020 for the ACT.

In Queensland, a target of 50 per cent by 2030 is gathering momentum and support for renewable energy projects is growing. Recent examples of the exercise of ministerial powers to call in the assessment of renewable energy projects are the Kidston Solar Project (Phase One) and the Coopers Gap Wind Farm as matters of state economic and environmental significance. The 50-megawatt Kidston Solar Project is part of a suite of 12 projects attracting A$1 billion in investment, which, once completed, will triple the amount of electricity produced from solar energy in Australia. In addition, Coopers Gap Wind Farm will feature 123 wind turbines with a capacity of 453 megawatts. The A$850 million project, scheduled for completion in 2020, will support 200 jobs during construction and create 20 operational positions.

### ii Existing framework and new developments at the national level

The federal government has continued to target economic growth programmes particularly in light of the shifting economy. Under a broad federal mandate to drive innovation, the government has identified reducing the regulatory burden on industry as a key objective. Often referred to as a policy of 'green-tape reduction', at a federal level there are significant developments under way whereby the government is aiming to repeal or amend regulation that might be viewed as stifling these economic growth objectives. . As a result, approximately 23.5 per cent of Australia's electricity generation is is being sourced from renewable energy projects. Drive to meet the target has been directed by the independent Australian Renewable Energy Agency (ARENA), which coordinates support for renewable energy technologies from the research and development stage through to commercialisation and deployment. In addition to marketing renewable energy projects to investors, ARENA ensures the information and experience gained from its projects is shared throughout the industry to benefit future projects. As with the state targets, major investment is expected to realise the targets being set and significant international interest is expected in this sector to help with this movement.

To complement the focus on strengthening social infrastructure projects across Australia, the government has developed national guidelines for the delivery of infrastructure projects to promote cross-government consistency and the use of best practice approaches. Additionally, the government is seeking to attract further private investment in public sector infrastructure projects to meet increased demand for infrastructure during the next decade, with opportunities for both domestic and international companies to invest.

Australia's unique history and the continued connection of indigenous communities with parts of the country have led to an important cooperative process whereby traditional indigenous owner groups may be afforded a right to negotiate regarding the development of projects. A mining applicant, for example, is often required to address native title rights and interests in the land before proceeding to production.

### iii International standards

Australia also recognises certain international standards. For example, the Equator Principles are an internationally recognised standard for managing social and environmental risk management within financial institutions involved in project finance. As in the United States, while there is no legal requirement to adopt this measure, some major financial institutions have voluntarily implemented the principles in their internal operations. This includes the Australian Export Finance and Insurance Corporation and Australia's four largest banks.

Significantly, in light of the interest in renewables, Australia remains committed to the 2015 Paris Agreement on climate change. Australia has targeted a reduction of emissions by 5 per cent below 2000 levels by 2020 and a further reduction of 26 to 28 per cent below 2005 levels by 2030. As noted, significant investment is needed to meet these targets. In a landmark decision, New South Wales Land and Environment Court cited the climate change targets in the 2015 Paris Agreement as grounds for refusing a development proposal for a coal mine reiterating, at least on a state level, Australia's commitment to the 2015 Paris Agreement and tackling climate change generally. Leading up to the Federal Election in May 2019 the Australia Government released the Climate Solutions Package on 25 February 2019. The package is the leading government policy toolkit for handling climate change and compliance with its obligations under the Kyoto Protocol and leading into the Paris Agreement. The package establishes a A$2 billion climate solutions fund.

Collectively, the laws and standards contribute to a balanced framework that protects the social and environmental aspects of commercial life in Australia.

## IX PPP FUNDING METHODS

The Council of Australian governments endorsed a National PPP Policy and Guidelines in 2008, which apply to all Australian government agencies. In line with this framework, the Australian governments will consider a PPP for any project with a capital cost in excess of A$50 million. This policy framework has been supplemented by individual governments, including Victoria's Partnerships Victoria, NSW's New South Wales PPP Guidelines and Queensland's Project Assessment Framework. Despite the policies, there remains concern regarding the level of risk transfer to the private sector, the costs incurred in bidding for PPP projects and the decision of the current Victorian government to cancel the A$5.3 billion East West Link PPP project several months after the PPP contract had been signed by the previous Victorian government. On the other hand, there have been many international contractors participating in bidding consortia for major road and rail infrastructure PPP projects.

Positive developments in the funding of PPP projects include the establishment by the federal government of the Northern Australia Infrastructure Facility to offer up to A$5 billion in concessional finance to encourage and complement private sector investment in economic infrastructure for the Northern Territory that otherwise would not be built or would not be built for some time, and the provision by the federal government of a A$2 billion concessional bridging loan to the NSW government to enable it to accelerate the WestConnex project.

## X FOREIGN INVESTMENT AND CROSS-BORDER ISSUES

### i Foreign investment

As a large, resource-rich country with relatively high demand for capital, Australia relies heavily on foreign investment to fund significant projects. Foreign investment is regulated by the Foreign Acquisitions and Takeovers Act 1975 (Cth) (FATA), its regulations and the foreign investment policy. The Australian Federal Treasurer, through the Foreign Investment Review Board (FIRB), administers these rules. The Treasurer is responsible for determining whether to allow certain foreign acquisitions of interests in Australian land, companies (including offshore companies with Australian assets), trusts, assets or businesses. As a general

rule, FIRB must be notified of all proposed foreign investment activity unless it is below the specified monetary threshold or a specific exemption applies. FIRB approval will be granted unless the proposed investment would be contrary to Australia's national interest.

In response to the global covid-19 pandemic, the Federal Treasurer has announced temporary changes to Australia's foreign investment regime designed to protect Australia's national interest during a period of significant economic and global upheaval. Effective from 10.30pm, 29 March 2020, all monetary thresholds under the Foreign Acquisitions and Takeovers Regulation 2015 (Cth) (Regulations) have been reduced to A$0 (reduced from as high as A$1.192 billion for certain investments). The immediate effect of this is that all investments into Australia by foreign persons will require approval irrespective of their value, unless an exemption applies. These measures are temporary but do not currently have an end date. Importantly, the exemptions to FIRB approval under the FATA and Regulations remain in place and are at this stage not impacted by any covid-19 developments.

A second aspect of the temporary covid-19 foreign investment measures is the announcement of likely extensions of the statutory approval time frame for FIRB applications. This timeframe is set at 40 days under the FATA but can be extended as required by FIRB. The Australian government has advised foreign investors to expect applications to take up to six months to be processed, however priority will be given to applications that protect and support Australian business and Australian jobs.

FIRB has the power to prosecute non-compliance and to unwind acquisitions deemed not to be in the national interest. If the relevant regulatory process has not been followed, penalties and even imprisonment may be imposed. In practice, if an acquisition is found to be contrary to the national interest, the most common consequence, alongside monetary penalties, is a forced divestiture of the assets or restrictive conditions imposed on the ownership of those assets.

Applications for FIRB approval must address the national interest considerations set out in the foreign investment policy, including national security, competition, Australian government policies (including and of increasing importance - tax), the effect on Australian economy and community, and the character of the investor. Foreign government investors (including companies in which foreign governments have an aggregate interest of 20 per cent or more) face more strenuous FIRB notification and approval requirements. Foreign investments in certain sensitive sectors (for instance, civil aviation, banking, shipping, telecommunications and media) also have additional approval requirements and ownership restrictions. The FIRB requirements will also be relevant for financiers seeking to take a security interest or enforce their security over Australian assets, as the acquisition of the security interest can require prior FIRB approval unless an exemption applies. Generally, taking or enforcing a security interest is specifically exempt from the requirement of obtaining FIRB approval in the context of certain genuine money-lending arrangements; however, this exemption is particularly limited in the context of residential land. These exemptions are still available despite the temporary covid-19 measures introduced.

More lenient screening thresholds usually apply for investors from certain countries with which Australia has a free trade agreement, including for example the United States and New Zealand. Higher monetary thresholds are also included in the free trade agreements with China, South Korea and Japan. However, lower monetary thresholds still apply to foreign government investors and in prescribed 'sensitive' sectors of Australian industry, such as media, telecommunications, military-type goods and services, transport and the extraction

of uranium. As noted above however, all thresholds regardless of the nature or origin of the investor or the sector in which they are investing are, until the covid-19 measures are reversed, now A$0.

Historically, the vast majority of foreign acquisitions have received approval, which in most cases is obtained within the standard 40-day statutory limit (see comments above in respect to the temporary extension of the statutory limit). However, the federal government has been increasing the level of scrutiny applied to a proposed investment, particularly in the residential and agricultural sectors. This heightened scrutiny has been applied most notably during the application phase, when applicants are now frequently asked to provide detailed tax and structuring information to demonstrate that their proposed and existing investments are in accordance with Australian tax law and policy. This has also meant increased delays in processing applications. In practice, FIRB is able to extend the time for considering an application for as long as is required.

The federal government charges fees for foreign investment applications, ranging from A$2,000 to more than A$100,000 with uncapped fees of approximately 1 per cent of the purchase price being imposed on residential land acquisitions. These fees are non-refundable if an application is rejected or withdrawn, although this policy has been relaxed slightly where a proposed investment is not continuing because of the covid-19 pandemic, in which case application fees may be refunded.

Approvals involving foreign government investors (including state-owned enterprises) are also under increased scrutiny, as are transactions involving agricultural land and water. Time limits for approvals in such cases can be significantly longer. Although only a small number of foreign investment approval requests have been denied in the past, in many cases conditions (sometimes onerous) are attached to approvals to ensure that the investment is not contrary to the national interest.

### ii Foreign workers

In March 2019, the federal government announced a new population policy with a focus on the regional workforce. One of the key features of this policy is the introduction of two regional visas for skilled workers, which require an applicant to live and work in regional Australia for three years before being able to access permanent residency.

Generally and separate from the regional visa programme, a large number of Australian visas allow holders to work in Australia. There are specific categories that enable an employer to sponsor temporary foreign workers for up to four years (depending on the occupation of the worker). A foreign worker must be employed in an approved occupation and have the skills necessary to perform that occupation.

The employer may be a business that operates in Australia or a business that does not formally operate in Australia but is seeking to establish a business operation in Australia or fulfil obligations for a contract or other business activity in Australia. Depending on the type of visa, an employer may be required to register as a business sponsor and demonstrate a commitment to employing and training local people. In most cases, there is also an obligation on the employer to ensure equivalent terms and conditions of employment to prevent the Australian workforce from being undercut, which means that minimum pay thresholds must be met and market salary rates be paid to foreign workers.

### iii Taxation issues

There are various taxes and charges at each level of government. Of these, the most substantive tax for Australian projects is income tax (including capital gains tax), which is levied by the federal government.

Australia-resident companies are subject to a tax rate of up to 30 per cent of taxable profits. Branches or permanent establishments of non-resident companies are taxed at the same rate.

If a company pays dividends to a non-resident shareholder from profits that have been subject to Australian tax, no withholding tax applies. However, if Australian income tax is not paid at the Australian company level, distributions of profits will be subject to withholding tax at a rate of up to 30 per cent (noting that withholding tax rates are generally reduced to 15 per cent or, in some cases, to 5 per cent or zero under Australia's income tax treaties with offshore jurisdictions).

Interest expenses are normally deductible against Australian income, though thin capitalisation limits apply. Under safe harbour rules, interest-bearing debt to equity can broadly be in the ratio of up to 1.5 to one without denial of interest under the thin capitalisation rules.

Interest withholding tax normally applies at a rate of 10 per cent, but in some limited cases this can be reduced to zero per cent (for example, in respect of payments to financial institutions in certain countries under double tax agreements, and in respect of certain offshore debt raised by Australian companies).

Australia has adopted an administrative approach to the tax residency of companies. Under this approach, a foreign incorporated company that carries on business anywhere in the world will be an Australian resident for tax purposes if the company's central management and control is in Australia. This can arise where a company's core policies and strategic decisions are made in Australia by a director whilst in Australia, even if the foreign company has no other connection to Australia. This approach will be subject to any income tax treaties Australia has with offshore jurisdictions.

Australia has a broad-based capital gains tax regime that applies to the disposal of assets and entities. In the case of non-residents, however, capital gains tax only applies to the sale of assets, such as assets used on the conduct of an Australian permanent establishment, land and mining tenements and interests in companies where a non-resident and associates have a greater than 10 per cent interest in the relevant company and the majority underlying value of the entity lies in Australian land, leases and mining rights.

Accordingly, non-resident shareholders may generally dispose of interests in Australian resident companies without Australian capital gains tax if the company is not land-rich in Australia, or if the non-resident's interest in the Australian entity is less than 10 per cent.

In addition, each state has its own regime of taxing new property purchases. For example, in NSW, stamp duty is payable on any transfer of property (subject to a few exemptions) based on the purchase price and calculated on a sliding scale. Further, foreign purchasers must pay an 8 per cent surcharge on the value of any residential land bought in NSW. The foreign purchaser surcharge is not payable on commercial residential property, such as hotels, making it still attractive for foreign investment in this area. The other states and territories have similar provision for foreign purchasers.

***Other taxes***

Australia has a goods and services tax (GST), which is a broad-based consumption tax applying at a rate of 10 per cent to most goods, services and supplies. GST is typically passed on and is normally creditable in business-to-business transactions. It does not normally apply to exported goods.

Various state-based mineral royalties apply to the production and sale of minerals extracted in relevant state jurisdictions. Petroleum resource rent tax also applies in respect of oil and gas projects conducted onshore, within Australia's territorial waters and other areas offshore.

### iv Licensing requirements

Within some states and territories, contractors who intend to undertake building and construction work and engineers who are supervising projects or undertaking design work are required to be licensed.

The consequences of carrying out unlicensed work can be severe and affect a contractor's entitlement to recover payment as well as rendering it liable to prosecution. Accordingly, any foreign entrant to the Australian construction market should fully investigate whether any licensing and pre-qualification requirements must be met before embarking on a project.

## XI DISPUTE RESOLUTION

It is a universal maxim that where there are construction projects, disputes will follow. The Australian construction industry is no exception, given the scale of commercial activity occurring within the industry at any given time and the innovation that is involved on the projects under construction. Construction disputes are inherently complex and often turn on highly technical questions of fact and law. As a result, they are especially prone to being protracted and costly for the parties involved.

There are a number of forums in which construction, engineering and infrastructure disputes may be heard and resolved, either finally or provisionally. The primary methods used by disputants within the construction industry remain arbitration, statutory adjudication and litigation. Other forms of alternative dispute resolution are available, however, including expert determination.

For the moment at least, the focus remains on dispute resolution, rather than dispute avoidance. Australia has not followed the global trend of embracing dispute avoidance mechanisms, such as dispute review boards (DRBs), given the perception that they are not cost-effective on projects under a certain monetary value. Nevertheless, DRBs have enjoyed some support, mainly on large-scale government projects.

The three primary methods by which construction disputes are resolved in Australia are arbitration, adjudication and litigation, as outlined below.

### i Arbitration

Arbitration as a preferred method of dispute resolution is undergoing a resurgence following widespread reform to legislation throughout Australia. Each state and territory has introduced uniform domestic commercial arbitration legislation that essentially enacts the UNCITRAL Model Law. The introduction of the uniform Commercial Arbitration Acts has simplified

Australia's legislative regime and enabled the courts to have reference to Australian decisions construing the UNCITRAL Model Law in the context of the International Arbitration Act 1974 (Cth), and to overseas decisions that consider the UNCITRAL Model Law.

The Australian Centre for International Commercial Arbitration (ACICA) administers international arbitration and the Resolution Institute administers domestic arbitration. Both institutes have a modern set of rules based on the UNCITRAL Arbitration Rules.

Further, for international commercial arbitration in Australia, the modernised ACICA Arbitration Rules address the difficulties that can arise in multi-party or multi-contract disputes by providing a mechanism by which an arbitral tribunal can join parties to the arbitration or consolidate multiple arbitrations occurring under related contracts. This is a particularly useful feature in international construction disputes, which often involve multiple parties or multiple contracts.

As of 1 January 2020, the Resolution Institute Arbitration Rules (RI Rules) have removed the schedule of caps on fees for the arbitrator and fees between the parties unless a cap is expressly agreed by the parties. The new RI Rules have also abolished the prohibition on discovery in disputes valued at less than A$500,000. Finally, the RI Rules have revised the fee payable to the Resolution Institute to appoint an arbitrator from a lump-sum fee (ranging from A$1,000 to A$25,000) payable by the parties based on the value of the dispute, to an obligation on the arbitrator to pay the Resolution Institute 10 per cent of his or her total fees invoiced to conduct the arbitration. It is a matter for the arbitrator and the parties to agree on whether this cost is passed on to the parties.

With the adoption of the uniform domestic Commercial Arbitration Acts, which align with the International Arbitration Act, Australian jurisprudence has been able to demonstrate that Australian courts adopt a pro-arbitration approach and fulfil their mandatory statutory obligation to uphold arbitration agreements and arbitral awards.

Australia's united legislative regime and the modernisation of both the ACICA Rules and RI Rules has put the country in an optimum position to continue to build its reputation as a stable jurisdiction for both domestic and international commercial arbitration.

### ii Adjudication

Since December 2011, every state and territory in Australia has enacted legislation providing for the interim statutory adjudication of construction disputes (commonly referred to as security of payment legislation).

Although they differ in content and procedure, the rationale underlying each of the legislative regimes is to establish a rapid means of securing interim progress payments to secure cash flow and reduce the instances of insolvency within the industry (which can have a cascading effect on a project down the contractual chain). Adjudication determinations do not finally determine the parties' positions inter se and payments made pursuant to them are made 'on account' only.

Despite its ubiquitous presence within Australia, the security of payment legislation lacks national uniformity. Instead, the nation's legislative regimes may roughly be divided into two categories: (1) the West coast model, which is intended to operate in a similar way to the Housing Grants, Construction and Regeneration Act 1996 (United Kingdom) and has been implemented in the Northern Territory and Western Australia; and (2) the East coast model, which operates in NSW, Queensland, Victoria, Tasmania, the ACT and South Australia. It has been mooted that the Western Australian adjudication legislation will be amended to reflect the East coast model, but these reforms have not yet been enacted.

### iii Litigation

Litigation is acknowledged to be a costly and often protracted process. These characteristics are only compounded when courts are called upon to determine construction disputes, with all their attendant complexities. For this reason, and given the availability of comparatively efficient, confidential and less expensive alternative dispute resolution procedures, litigation remains an option of last resort by the parties to construction disputes.

While Australia does not have specialist courts whose sole function is to hear and determine construction disputes, certain jurisdictions (such as NSW and Victoria) have specialist case lists to facilitate the management and hearing of construction litigation. Judges with expertise in construction litigation are appointed to preside over these lists.

In recent years, legislation has been enacted to improve the case-flow management of matters that are before the courts.

## XII OUTLOOK AND CONCLUSIONS

Australia remains an attractive jurisdiction for both domestic and foreign investment, largely because of its mining and resources projects, as well as projects involving the construction of significant public infrastructure.

The key constraints affecting Australian projects remain the availability of a suitable workforce to undertake the projects and the volatility of commodity prices underpinning project valuations. The ability of international companies to introduce their highly skilled workforce to Australian projects and reduce project operating costs will be critical to the completion of these projects within budget and on time.

It is expected that the ongoing investment of Chinese and Indian companies in major Australian projects will continue to fuel the expansion of construction activities. Major infrastructure spending is under way and increases are forecast. Although the resources sector remains a dominant component of the Australian economy, other sectors, such as agriculture, tourism and social infrastructure, are rising to prominence.

**Appendix 1**

# ABOUT THE AUTHORS

## MATT BRADBURY

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Matt Bradbury is a partner in McCullough Robertson's projects group. He is an infrastructure, construction and engineering lawyer who has advised on civil, building, mechanical, renewable energy resources and structural projects in each state and territorial jurisdiction of Australia and throughout South East Asia. Mr Bradbury advises on all aspects of construction, infrastructure and major engineering projects, working side by side with his clients and their external consultants to successfully deliver their projects. He advises clients on risk mitigation and administration of contracts so as to avoid disputes. He also currently acts on behalf of state and local governments, government-owned corporations, owners, contractors and consultants and advises a number of professional bodies and industry associations. He is currently advising a number of major contractors with respect to the various LNG and resources projects that are being completed in Queensland, the Northern Territory and Western Australia. Mr Bradbury has practised in both Australia and the United Kingdom and was recently successful before the High Court with respect to the review of an Adjudicator's determination.

## EVAN ECONOMO

*McCullough Robertson*

Evan Economo is a construction and infrastructure lawyer with more than 18 years' experience gained through a combination of in-house and private practice roles. Evan has an in-depth understanding of the issues faced by stakeholders and participants in the construction, infrastructure and resources sectors. He understands the operational and commercial drivers than underpin complex projects. By combining this understanding with legal technical excellence, Evan is well placed to partner with clients to meet their legal and commercial needs across the entire project lifecycle, from transactions through to project delivery and disputes.

His particular area of speciality is in project delivery. Evan has years of experience at the coalface of complex projects (across build and operation phases) and assists contractors, service providers and principals to navigate complex and intersecting contractual, legal, technical, operational and commercial issues, helping to achieve successful project outcomes.

**DAVID GILHAM**

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David Gilham is a partner in McCullough Robertson's finance group. He acts for financiers and corporate borrowers on a broad range of debt financing transactions, including real estate investment and development financings, leveraged and acquisition financings, project financings and general corporate financings. He has significant experience in advising foreign financiers and corporates on their participation in Australian projects.

**WEI LIM**

*McCullough Robertson*

Wei Lim acts for major banks and borrowers in lending transactions across various sectors, including apartment construction, land subdivision, healthcare, general corporate, agribusiness, industrials and resources. His experience spans more than 10 years of private practice in Australia, the United Kingdom and Hong Kong, and almost five years in-house at a major Australian bank.

Wei has a strong background in corporate and institutional property financing, and in debt capital market and project finance transactions.

**STRATI PANTGES**

*McCullough Robertson*

Strati Pantges is a senior projects lawyer with over 14 years' experience in Australia, the United Kingdom and Russia working in top-tier and Magic Circle law firms. He specialises in the structuring, development and operation of large-scale projects in the energy and renewables, resources and infrastructure sectors, including advising on all regulatory and non-regulatory issues and negotiating project documentation. Strati has acted for all levels of governments as well as private sector sponsors, financiers and contractors on landmark projects both within Australia and internationally.

**ANDREW BUKOWSKI**

*McCullough Robertson*

As a commercial and corporate lawyer who has worked in-house for a major mining company, Andrew Bukowski specialises in business transactions, sales and acquisitions and joint ventures in the resources and energy sectors. He has acted for a range of clients from listed and large private companies involved in exploration and operational projects in coal, gas, minerals and metals through to junior explorers and service providers. His work has covered multiple jurisdictions, including Australia, North America, Myanmar, Mongolia, Russia and Indonesia.

Andrew has first-hand experience in the development, sale and acquisition of renewable energy projects in Australia, including engagement with government agencies and authorities, local landowners and foreign developers and investors.

**XAVIER MILNE**

*McCullough Robertson*

Xavier Milne is a lawyer in McCullough Robertson's construction and infrastructure group. He acts for employers, owners, principals, contractors, subcontractors, state and local governments in the infrastructure, construction and transport industries. Xavier works closely with clients to guide them through dispute resolution processes to resolve construction related claims. He has experience dealing with a wide range of issues on construction projects including issues related with variation, delay and disruption, latent condition, extension of time and defective work claims.

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