DOING BUSINESS IN AUSTRALIA

INFRASTRUCTURE & CONSTRUCTION

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Doing Business in Australia – Infrastructure & Construction is designed to complement DLA Piper's Guide to Doing Business in Australia.

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INTRODUCTION

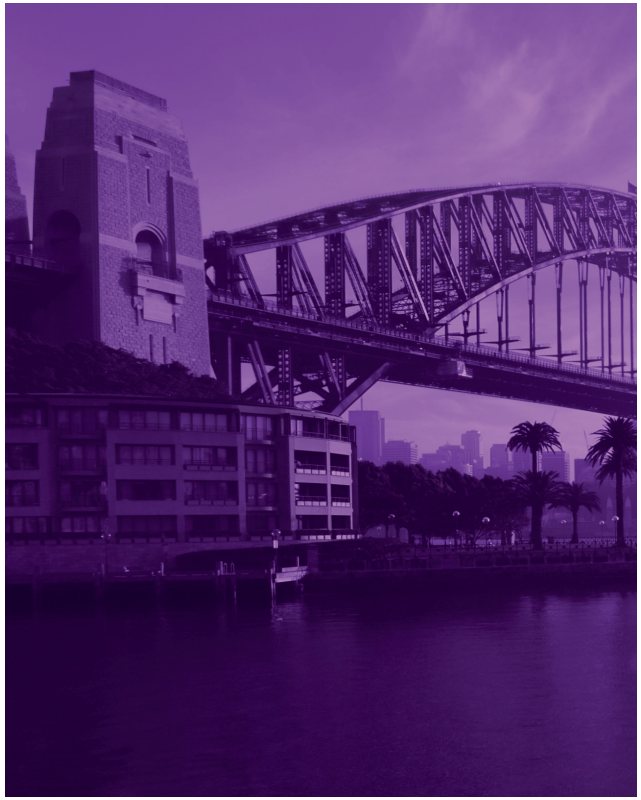
Australia offers one of the world's safest and most productive environments for international participation in the construction and infrastructure industry. Although the market has slowed since late 2014 due to a downturn in the mining sector, record low-interest rates and significant government infrastructure investment continues to sustain respectable industry growth.

There are a limited number of construction and infrastructure players operating in the Australian market, and this coupled with an increase in major infrastructure projects, means that there are real opportunities for international providers.

Although governments encourage a competitive and vital construction market, and recognise the benefit created by the globalisation of industries and services, foreign entrants to the Australian market need to be aware that the regulatory and legislative regimes applicable to the infrastructure industry are complex, vary throughout Australia, and must be navigated in order to maximise the many opportunities available in Australia. For those projects which receive government funding, there are additional requirements to be met.

This Guide is designed as a snapshot for new entrants into the market to both identify where the opportunities may lie, and to understand how major infrastructure is procured and delivered in Australia.

For more detail on the business environment in Australia more broadly, please see our companion guide Doing Business in Australia issued in 2015 at https://www.dlapiper.com/~/media/Files/Insights/Publications/2015/08/Doing_Business_in_Australia_Guide_UPDATED%20AUG.pdf



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INFRASTRUCTURE & CONSTRUCTION MARKET

Australia has a prosperous market economy and a gross domestic product (GDP) comparable to industrialised western European countries. With stable economic and political climates, it offers a low short-term trading risk.

During the Financial Crisis, GDP fell in every major advanced economy[1]. Although Australia did not go into recession and its unemployment rate has remained relatively low, growth has remained slow over the past few years. According to Tradingeconomics.com, Australia's GDP growth rate in 2015 is likely to be 0.57%. In addition, for 2016, the Organisation for Economic Cooperation and Development (OECD) has forecast Australia's GDP growth at 3.0%. These forecast figures are impressive when compared to total OECD growth in 2015 of around 1.9%.[1]

The Australian economy is projected to grow by 84%, from $1.4 trillion in 2011 to $2.6 trillion in 2031. And Australia's population is expected to increase by almost 50% from 22.3 million in 2011 to 30.5 million in 2031.

The value-add (economy-wide spending) attributable to infrastructure services was estimated to be 13.3% of GDP in 2011 (with over 70% attributable to transport). The value add attributable to infrastructure services is expected to grow proportionately to the economy to 2031[2].

As has been the case for the last 7 or 8 years, there remains a widespread view in Australia that both government and the private sector must make substantial investments in infrastructure over the next 20 plus years in order to bridge the 'gap' between Australia's current infrastructure and the infrastructure Australia needs to address its economic, societal and environmental needs.

[1] OECD Economic Outlook and Interim Global Economic Assessment http://www.oecd.org/economy/outlook/economicoutlook.htm
[2] Australian Infrastructure Audit Report issued April 2015 http://infrastructureaustralia.gov.au/policy-publications/publications/Australian-Infrastructure-Audit.aspx

MARKET SECTORS AND MARKET SHARE WITHIN AUSTRALIA

Infrastructure in Australia can be divided into the following market sectors:

- Institutional, government and social infrastructure (such as schools, hospitals, stadia, prisons).
- Commercial and industrial (such as hotels, office buildings, factories, entertainment and recreational buildings).
- Residential (such as multi storey, single dwelling, refurbishment).
- Non building infrastructure (such as energy including oil and gas, electricity, solar, wind and biomass, mining infrastructure, telecommunications and utilities infrastructure, transport infrastructure such as rail, road and ports, and water infrastructure such as pipelines and dams).
- Specialised sectors such as maritime and defence.

The small builder residential market and the specialised sectors remain largely discrete from the rest of the market.

Generally the bulk of construction activity in Australia is carried out in Western Australia, New South Wales, Queensland and Victoria. The remaining Australian states and territories account for less than 10% of the total construction carried out nation-wide.

TABLE 1: INFRASTRUCTURE MARKET SHARE[3]

Market Sector	2014 – 2015 revenue (AUD Million)	2014 – 2015 growth in industry value added
Commercial and industrial	30,900	2.3%
Institutional	14,142	0.6%
Heavy industry and non building infrastructure	57,300	-8.8%
Roads and bridges	18,221.9	7.5%

[3] This table is based on information in the Ibisworld 2015 Industry Reports on Commercial and Industrial; Institutional; Heavy Industry and Non Building Construction; and Roads and Bridges, www.ibisworld.com.au

KEY PLAYERS IN THE MARKET

The market for infrastructure services in Australia is considered to be competitive. Although there is some concentration of ownership of contractors, there is no one contractor which dominates this market. In recent years there has been considerable activity in the top tier of contractors with some consolidation, and other large contractors (such as John Holland) changing ownership.

Some of the key players in the infrastructure industry in Australia are wholly or partly owned by foreign companies.

In 2014 German construction firm Hochtief AG recently increased its majority shareholding in Leighton Holdings Ltd (now CIMIC Group Limited). Hochtief AG is owned by Spanish construction giant, ACS.

In December 2014, China Communication Construction Company International Holding Limited purchased John Holland Group. The acquisition gained the approval of the Federal Treasury in April 2015.

In Australia, the largest participants in the construction industry[4] are:

- Leighton Contractors Pty Ltd (a wholly owned subsidiary of CIMIC Group Limited, Leighton is the building arm of CIMIC in Australia).
- Thiess (a wholly owned subsidiary of CIMIC Group, Thiess is the mining arm of CIMIC in Australia).
- Downer EDI Limited.
- Lend Lease Group (which incorporates Baulderstone and Abigroup Limited).
- John Holland.
- Brookfield Multiplex.
- Grocon.

CIMIC Group Limited, Downer EDI Limited and Lend Lease Group hold 5.3% of the construction market. The balance of the market is held by Grocon and other contractors, including:

- Laing O'Rourke Australia Pty Ltd.
- Watpac Limited.
- ABN Consolidated Holdings Pty Ltd (Alcock Brown-Neaves Group).

ROLE OF GOVERNMENT AND THE PRIVATE SECTOR

The state and federal governments are a key driver for demand in many key industry sectors, especially in critical transport, water and social infrastructure. The Australian government still owns and operates the mail system and many states continue to own gas and electricity assets, and healthcare providers. Increasingly, however, state government agencies are looking to sell assets to raise revenue.

The New South Wales government has commenced a program of privatisation (known as asset recycling) in relation to its electricity distribution network (the 'poles and wires'). In June 2014, the NSW government announced the sale of Green State Power's renewable assets including the Hume, Burrinjuck and Keepit dam hydro power generators; the Blayney wind farm and 80% of the Crookwell wind farm. Further, the sale of Colongra power station, the largest gas-fired generation plant in NSW, was finalised in January 2015.

Local authorities own and operate water utilities, although in states like Victoria these have now been largely privatised.

The private sector, encouraged by federal and state government policy, has over the last 20 years become increasingly involved in funding, providing and managing infrastructure. Privatised assets include gas and electricity utilities, telecommunications and road, rail and air transport, and some institutional infrastructure such as hospitals and courts.

[4] Ibisworld Industry Report E Construction in Australia (July, 2015), www.ibisworld.com.au

In some areas the proportion of government funding has dropped over the last decade as a result of privatisation and corporatisation of assets and government authorities, and the growth in PPPs.

Recently another trend has emerged, where major infrastructure projects are cancelled or terminated upon a change of government. In New South Wales, the Sydney Metro Project was cancelled in February 2010. In Victoria, the $5.3 billion East West Link project contract was terminated in late 2014 when a new government was elected. In Queensland, following the change of government in early 2015, the proposal to asset recycle the State's poles and wires was cancelled.

THE INFRASTRUCTURE 'GAP' AND MARKET TRENDS

It is widely agreed that infrastructure makes a significant contribution to the Australian economy. The direct economic contribution of infrastructure in 2011 was $187 billion. This is projected to increase to $377 billion in 2031. Assessing the direct economic contribution of infrastructure gives guidance as to where demand is highest.

For the last decade many commentators have argued that there is a need for significant investment in Australia's infrastructure. This need derives from the sustained growth of the Australian economy, population increases and underinvestment by the state and federal governments and the private sector over the last two decades. In addition, the geographic size of Australia means that good transport and telecommunication links are both critical and costly.

In response to this, spending on infrastructure as a proportion of GDP has been higher in the years 2009 to 2014 than in the preceding 20 years. However, other fiscal pressures will make it challenging for governments to maintain this level of expenditure.

Further, a number of infrastructure sectors are forecast to grow faster than GDP, namely telecommunications, airports, gas pipelines, transport and ports.

Infrastructure Australia has identified the following sectorial priorities:

- Urban transport.
- Road and rail land freight.
- Additional capacity in airports in Brisbane, Melbourne, Perth and Sydney.
- Quality and reliability of water services.

The following trends will impact on the delivery of infrastructure (when, how and at what cost) over the next few years:

- What solutions the various Australian governments are able to find and implement to the challenge of funding (and financing) infrastructure. A number of models and options have been discussed and proposed including value capture forms such as tax increment financing, expanding user pays, expanding the asset recycling programs, issuing Commonwealth bonds, expanding the PPP model and implementing further reforms in the various infrastructure markets.
- The need to 'do more with less'. Increasingly infrastructure providers are focus Sing on the assets they have, and how to maximise the performance of those assets. Maintenance of and extracting value from existing infrastructure assets (particularly road, rail and water) will be critical.
- Once the National Broadband Network is completed, high quality telecommunications infrastructure will provide opportunities for development of improved asset management systems.
- IT is playing an increasingly critical role in all forms of infrastructure. For example in the context of road infrastructure, freeway management systems are being installed on key freeways in many states. Similarly, demand management measures to reduce congestion (for example congestion charging) are being piloted on some roadways and these also have a significant IT component.
- An increased focus on 'future proofing' our infrastructure to:
  - address the transition to a lower emissions economy.
  - achieve sustainability.
  - allow for the projected decrease in rainfall in southern Australia.
  - ensure resilience in the face of natural disasters and other crises.

- More attention is being paid to building standards and material quality in the context of the globalisation of the market for almost all kinds of supplies and the relatively 'light touch' regulation in place in Australia for these matters[5].

INFRASTRUCTURE AUSTRALIA

Infrastructure Australia is a statutory authority established in 2014 under the *Infrastructure Australia Act* 2008 to advise the Australian Government on nationally significant infrastructure including transport, energy, communications and water infrastructure.

Infrastructure Australia gives independent advice to the Australian Government with the aim to:

- Improve decision-making.
- Identify and assess key drivers of infrastructure demand and use.
- Better prioritise projects.
- Promote best-practise planning, financing, delivery and operation of infrastructure projects.

Further to its advisory role, Infrastructure Australia publically advocates on key infrastructure issues.

Infrastructure Australia particularly lobbies for reform on issues including the utilization, financing, delivery and operation of infrastructure.

A key priority in 2015-16 for Infrastructure Australia is the delivery in late 2015 of a 15 year national infrastructure plan (the **Australian Infrastructure Plan or AIP**). The AIP is intended to identify reforms and investment initiatives at state and federal level. Drawing on analysis in the 2015 Australian Infrastructure Audit, the AIP will consider key demand drivers and challenges in the infrastructure sector.

An important flow-on from the AIP is Infrastructure Australia's formulation of the Infrastructure Priority List. Infrastructure Australia is responsible for undertaking a rigorous prioritisation process to ensure an appropriate pipeline of projects are reflected in the Infrastructure Priority List.

In the last five years several state governments have also passed legislation to establish bodies which are tasked with advising governments on key infrastructure issues, developing long term infrastructure strategies and prioritising projects[6].

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Australian Bureau of Agricultural and Resource Economics – http://www.agriculture.gov.au/abares

Australian Bureau of Statistics – www.abs.gov.au
Committee for Economic Development of Australia – www.ceda.com.au
Infrastructure Partnerships Australia – www.infrastructure.org.au
Infrastructure Australia – www.infrastructureaustralia.gov.au
Infrastructure Report Card – http://www.engineersaustralia.org.au/infrastructure-report-card
Minister for Infrastructure and Regional Development – www.minister.infrastructure.gov.au
Organisation for Economic Co-operation and Development – www.oecd.org

[5] The Building Code of Australia deals with matters such as access, egress, energy efficiency and fire resistance. Most contract specifications rely on compliance with the relevant Australian Standard.

[6] Infrastructure Victoria is expected to be established in late 2015, Infrastructure New South Wales was established in July 2011, Infrastructure Tasmania in 2014.

PROCUREMENT OF INFRASTRUCTURE IN AUSTRALIA

In Australia, procurement of infrastructure projects is almost invariably carried out on a contestable tender basis. This is considered to be a fair, transparent and competitive way to obtain value for money. Such contestability may be publicly advertised, as is often the case with government procured construction, sought from a formal pre-qualified list of bidders or informally sought from a private list of contractors. Tender processes can range from simple to complicated, with parties often being asked to participate in lengthy negotiations. This most commonly occurs where the subject matter of the procurement is cutting edge or difficult to specify (for example as is the case with information technology projects or long term or highly technical procurements in the defence sector). For government projects, ensuring probity of the process is a high priority.

The costs of tendering in Australia can be substantial, particularly in response to government requests for tender and in relation to projects being delivered on a PPP basis.

State and federal government agencies do not generally reimburse the costs incurred by a contractor in submitting a tender and participating in negotiations although occasionally a proportion of costs are paid[7].

Unlike in the European Union, there is no body of public procurement law. Procurement by the state and federal governments is governed by a mixture of policies such as guidelines and codes of practice, statute, regulations and common law.

While private sector procurers of construction services are generally free to set their own 'rules' of procurement, they can still be exposed under statute (for example under the Australian Consumer Law) or at common law. Procurers will find themselves exposed to these laws if they either do not follow the process which has been specified in the tender documentation or if they make inaccurate representations about the way in which the tender process will be managed or contracts awarded. Conversely, bidders may be exposed to common law process contract challenges if they withdraw during evaluation.

FRAMEWORK

In addition to the infrastructure research and advisory bodies established by some states and the federal government, each government agency has at least one designated department or body which develops and implements policy applicable to procurement of infrastructure projects. In some cases specialised policies will apply to particular types of procurement such as defence, health infrastructure and the delivery of PPPs and unsolicited proposals. In addition, government agencies which procure a large amount of infrastructure (for example statutory road management agencies) often have their own internal policies and procedures applicable to the procurement of that work.

For projects with a value in excess of A$10 million, many government agencies have implemented a system of audits, checks and balances to seek to ensure that the tender and procurement processes are competitive, transparent and compliant with the relevant rules and policies. This means that many government agencies are required (or choose) to:

- Appoint a probity auditor to audit the tender process for the project.
- Engage a probity adviser to provide ongoing advice to the agency in relation to management of the tender and tender queries.
- Participate in periodical reviews (sometimes known as 'Gateway' reviews) in order to benchmark, test and check the business case for the project. A review of this nature is intended to provide targeted feedback at key decision points during a project's life cycle.

[7] On government projects delivered on an alliance contracting basis, the National Alliance Contracting Policy provides for a party to an Alliance Development Agreement to be paid for certain preliminary services provided under that agreement (such as design development) with payment secured with a bond https://infrastructure.gov.au/infrastructure/nacg/index.aspx. Also, occasionally a proportion of the costs incurred by an unsuccessful bidder on a PPP project are paid

LAW OF TENDERING

Traditionally, the position in Australia was that a call for tenders was no more than an invitation to treat (that is, an offer to receive an offer). A tender submitted in response to such an invitation was an offer, and the principal was free to accept or reject the offer. This meant that no contractual legal relationship was created until the offer was accepted.

Following the 1997 Federal Court of Australia decision of *Hughes Aircraft*, it is now the case that often, when a procurer issues tenders for infrastructure work, the procurer:

- Creates a 'pre-contract contract' known as a bid or process contract.
- If a government body, must act in good faith with all tenderers as a term of that process contract. This duty of good faith (sometimes called 'fair dealing') constitutes at the least, an obligation to act honestly, and probably also to act reasonably.
- If a government body, must clearly specify the basis for assessment of tenders and otherwise follow the process it sets out for issue and submission of tenders. In particular, all evaluation criteria must be clearly specified.
- If a government body, ensure that it sets out clear rules for the negotiation with successful and preferred tenderers.

A government agency may be exposed to legal liability if, for example it does not comply with its own tender processes, it evaluates a tender by reference to criteria not identified in the tender documents or it accepts a non compliant tender without alerting tenderers to that possibility.

Following the Hughes Aircraft decision, tender documents issued by government agencies have become very detailed, and set out a clear process for evaluation and selection of tenders. A government agency will usually specify all the evaluation criteria applicable to the tender assessment, and require a tenderer to submit information in relation to each criterion. An agency will also typically require the provision of detailed information on track record, financial position, occupational health and safety, industrial relations arrangements, subcontracting arrangements, project management methodology and quality assurance certification.

WHAT IS PROBITY?

Probity is the general term which is used in the context of procurement to describe a defensible process which achieves value for money is able to withstand internal and external scrutiny and which meets certain requirements, namely:

- Transparency.
- Integrity and honesty.
- Impartiality.
- Fairness.
- Accountability.
- Eliminating or managing appropriately any conflicts of interest.

As part of this, a government agency must treat tenderers equitably. Occasionally this is confused by parties with an obligation to treat tenderers equally. The latter is not required for probity. Put another way, a probity concern will arise if a bidder has obtained an unfair advantage over other bidders in the process.

Probity is tested and managed in a number of ways but in particular it is achieved via the various policies and guidelines in relation to procurement issued by the relevant government agencies.

Probity is particularly important in the context of government procurement. Ensuring probity can provide a government agency protection from an allegation that it has failed to ensure proper process or to treat tenderers fairly. Given the expenditure of public money which is involved, it is critical that any government is able to demonstrate that a proper process has been followed. Proper process leads to a better value for money outcome, and enables risk mitigation. Further, government work is keenly sought for various reasons, and there is more cash flow certainty. This means that the incentive on bidders to 'cut corners' may be increased.

Some practical examples of where a probity issue may arise are:

- If a bidder obtains, or may be perceived to have, inside information about the government's technical requirements and expectations due to that bidder's other work for government. **Example:** if a designer does some preliminary design for government on a project and then participates in a bidding consortium for that project.
- If a bidder obtains inside information about the procurement process due to an unauthorised disclosure. **Example:** if a government employee tells a bidder or bidders (but not all) about the weighting to be applied to the evaluation process.
- Where a long term incumbent is re-appointed without market testing.
- If different information is given about the scope of the work or services to each tenderer. **Example:** if a joint briefing process is not conducted, or if different government employees are permitted to communicate with bidders.
- Where there are post contract variations which should have been marked tested.
- If there are two related entities bidding for the same work.
- Where the scope changes post tender but pre-contract and inappropriate negotiations are held with one or selected bidders.
- If a related entity of a bidder has advantageous information which might be provided to that bidder as a result of business operations. **Example:** a related entity of a contractor provides preliminary consulting advice on a project to the government and that contractor then seeks to bid for the delivery of the whole project.

If a probity issue arises, it may be able to be:

- Resolved by disclosure.
- Managed provided it is disclosed, documented and appropriate systems are established.

STATUTORY REGULATION OF GOVERNMENT TENDERS

The Australian Consumer Law (and state based Fair Trading legislation) will prohibit certain kinds of behaviour and conduct during the course of a procurement, for example, misleading and deceptive conduct. Bid rigging, cover pricing and certain other collusion between tenderers is prohibited under the Competition and Consumer Act [8].

To avoid the possibility of collusion or corruption, tenderers may be asked to provide a statutory declaration that there has been no collusion in the tender process with other tenderers.

To emphasise the transparent nature of government tendering, many government agencies are often now required by statute or policy to publish detailed information:

- Identifying the successful tenderer.
- Specifying the tender prices submitted by all tenderers.
- About the nature and form of contract executed in respect of the works.
- Government agencies may also be required to disclose information under Freedom of Information legislation or through pre-trial discovery processes.

There is also federal and state legislation which governs the way in which government monies may be expended, and in some cases this extends to how such expenditure may be procured. For instance at the Australian government level the *Financial Management and Accountability Act 1997* and its regulations, which apply to in excess of 80 federal government agencies, set out the basis upon which government officers may approve proposals for the expenditure of public money and require the proper use of Commonwealth resources.

[8] Division 1 of Part IV of the *Competition and Consumer Act* 2010 (Cth)

POLICIES, GUIDELINES AND CODES OF PRACTICE

There are numerous policies, guidelines and codes of practice which govern procurement of infrastructure by government agencies at all levels of government.

In some cases, such as the Commonwealth Procurement Rules (CPRs) issued by the federal government, there are rules dealing specifically with when competition in a tender process may be limited, and additional requirements for procurements at or above a certain threshold.

The core objective of the CPRs is to ensure that value for money is obtained in Federal government procurement. The value for money principle requires consideration of all relevant financial and non-financial costs and benefits of each proposal including whole-of-life costs (such as any maintenance costs or costs in connection with a dispute). The CPRs state that value for money is enhanced in government procurement by:

- Encouraging competition and being non-discriminatory.
- Promoting the use of resources in an efficient, effective, economical and ethical manner.
- Making decisions in an accountable and transparent manner.
- Encouraging appropriate engagement with risk.
- Ensuring that the procurement process is commensurate with the scale and scope of the procurement.

Many government agencies also have specific policies directed at the delivery of projects by different forms of procurement such as a PPP or alliance contracting.

Finally, several state and territory governments have developed codes of practice for the building and infrastructure industry which set out the obligations of the relevant government agencies in tendering, procuring and managing the delivery of infrastructure works. These codes also provide a mechanism for a party to report breaches in the tender process, and to lodge a complaint about the conduct of a government agency in a tender.

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DELIVERING
INFRASTRUCTURE AND CONSTRUCTION PROJECTS

SELECTING THE RIGHT PROJECT ENTITY

In Australia the project entity will vary depending on a range of matters including the type of project to be delivered, the short and long term business strategy and tax considerations. Almost all project delivery businesses operate as incorporated entities, as either a private (proprietary) or public company. PPPs are generally delivered by a special purpose vehicle. Project alliances often involve an unincorporated joint venture. The tax, employment and other treatments will vary depending on the nature of the project entity[9].

PROJECT DELIVERY STRUCTURE

A number of different forms of delivery are used for infrastructure projects in Australia. The most common of these are:

- Construct only – this form is usually procured on a lump sum basis. Other pricing mechanisms include using a bill of quantities or schedule of rates.
- Design and construct, design build or document and construct – where there may be a preliminary design and, at times, a requirement that the designer be novated to the design and construct contractor. Under this model the contractor takes responsibility for the design and construction of the project. The level of design required will depend on the extent to which that design has been completed by the principal prior to engagement of the contractor. Variations on this form of procurement include design, build and maintain or design, build and operate.
- Engineer, procure and construct contract (EPC) or engineer, design, construct and maintain (EDCM) – which are commonly used for greenfields projects with large procurement elements (for example for plant and equipment). Under this form of delivery a contractor will agree to deliver the project for a fixed price based on fixed scope, or schedule of scope.
- Construction management and managing contractor models – where the contractor is paid a fee for managing delivery of the works and the trades and subcontractors are progressively procured and engaged either by the contractor or the principal.
- Operate and maintain – these are used for facility management services and the like, and other projects which are essentially an outsourcing arrangement.
- Models incorporating a finance or operate component – BOO (build, own, operate), BOOT (build, own, operate, transfer), DBOM (design, build, operate and maintain) and DBOF (design, build, operate and finance). These models (aside from the BOOT model) are essentially the form of procurement used for PPP projects but without the additional obligation to return the asset to the state at the end of the term of operation.
- Various hybrids of the above – which may incorporate a relationship, collaborative or risk sharing element, forms of payment incentive such as shared savings, cost controls such as guaranteed maximum price, and time controls.

In some sectors of the infrastructure industry one type of procurement may be dominant. For example, in the high rise residential sector, where time frames can be tight and flexibility is required to enable purchaser driven changes throughout the course of the works, a design and construct contract with a fixed price mechanism is often used. On the other hand, an EPC form of contract is often used for energy (such as gas and wind) projects, as these projects involve the supply and commissioning of a large proportion of plant and equipment.

PUBLIC PRIVATE PARTNERSHIPS

In December 2008, Infrastructure Australia published an updated National PPP Policy and Guidelines which were endorsed by the Council of Australian Governments.

[9] [cross reference to Doing Business in Australia Guide – Business Entities Section]

The Guidelines:

- Aim to consolidate the PPP guidance materials available across Australian jurisdictions to provide a unified national framework; and
- Seek to maximise the efficiency of infrastructure procurement, reduce public and private sector PPP procurement costs, and remove disincentives to participation in the infrastructure market.

The Guidelines define a PPP as a "*long-term contract between the public and private sectors where government pays the private sector to deliver infrastructure and related services on behalf, or in support, of government's broader service responsibilities*".

Each state government now has its own PPP policy or requirements which must be applied alongside the National PPP Policy and Guidelines to the extent permitted by the Guidelines. The various policies:

- Require the preparation of a number of rigorous and detailed business cases and assessments at each stage of the delivery of a project.
- Require market testing at the procurement stage through a competitive tender process between the various private sector participants (usually structured as consortia in the form of a special purpose vehicle with interest by the financier, builder, designer, operator and maintenance contractor).
- Impose some form of a value for money test.

PPP models

PPPs can take on a variety of forms depending on how the risks are shared between parties.

At one end of the spectrum, private contractors are used as an alternative to public service providers to take on discrete risks. At the other end, private sector participants may finance, design, build, operate and own the asset for a defined period of time.

In the case of toll roads, the government will usually hand over operation to the private sector participant for the period of the concession – this is the Design Build Finance Operate Maintain (DBFOM) model. In the case of social infrastructure such as hospitals and schools, the government will retain the obligation to provide the core services such as healthcare or education but may engage the private sector to maintain the facilities – the Design Build Finance Maintain (DBFM) model.

These models require a large proportion of key project risks to be borne by the private sector participant. The private sector participant offsets these risks by pricing the investment return (service fees or tolls) over a period typically in excess of 20 years. In theory, private sector players have the additional incentive of profit to drive their actions and this can in turn help to produce competitively priced services for transportation, utilities, healthcare and even social facilities, all of which are essential for the continued expansion of the Australian economy.

In privately financed projects, private equity and debt are raised on the basis of projected performance of the project. This drives managers to act commercially, which means ensuring project economics are realistic, projects are delivered on time and budget, assets are operated at targeted performance levels and costs, revenues are collected, expenses are monitored and controlled, and ongoing improvements are pursued.

There is no reliable data as to the total number of PPP projects delivered in Australia to date; however, it is clear that New South Wales and Victoria alone have awarded at least 60 PPP projects, ranging from hospitals to courts and toll roads. The use of the PPP model is the highest in New South Wales and Victoria at around 10%, but nationally speaking the percentage is lower than 10%.

Many large projects have been successfully delivered using a PPP model. For example, Melbourne's CityLink and Sydney's Eastern Distributor projects are generally considered to be successful public infrastructure projects from the point of view of both the public and private sector.

On the other hand, the PPP model has not always been successful in Australia. For example, the traffic volumes of the A$1.1 billion Lane Cove tunnel in New South Wales were less than half those predicted upon opening, which led to large write-offs by those involved in the operation of the tunnel. Within three years of opening, the tunnel went into receivership and was sold to toll-road operator Transurban for A$630 million.

In July 2014, the Productivity Commission stated[10] that whilst private financing of infrastructure, including through the PPP model, has grown over recent years, the commercial failure of some toll roads and the global financial crisis has led to a slowing of this growth.

Future developments for PPPs

Infrastructure Australia's April 2015 report 'Australian Infrastructure Audit: Our Infrastructure Challenges' identified the following barriers to competition in PPP procurement:

- A limited pipeline of projects that is uneven in nature.
- A perceived lack of consistent commitment to PPPs across all Australian jurisdictions.
- The magnitude of bid costs.
- A lack of coordination of the timing of the projects coming to market across states and territories.

The report also notes that the Productivity Commission has made recommendations to lower these barriers, including a recommendation on more consistent and rigorous application of the National PPP Guidelines on the criteria for determining whether PPP procurement is appropriate for a project.

Infrastructure Australia aims to make recommendations on the delivery of a more comprehensive pipeline of nationally significant projects as part of the Australian Infrastructure Plan to be released later in 2015.

Other industry players have expressed concern about the PPP market in Australia. They have stated that Australia has, in recent years, lost ground within the global PPP market as it is no longer considered the 'go to' jurisdiction of PPP best practice[11]. As a result state and federal government are being urged to ensure greater consistency of approach by the implementation of infrastructure reform.

Due to greater flexibility in some Australian jurisdictions, increasing numbers of major infrastructure projects are being delivered as 'unsolicited proposals'. These are proposals developed by the private sector and presented to government without the public sector having followed a public procurement process. There have been a number of major unsolicited proposals in recent years, including the $2.6bn NorthConnex motorway tunnel and the CityLink Tullamarine Freeway upgrade. In the coming years, this may be a more common method of delivering economic infrastructure in Australia.

USEFUL REFERENCES

Infrastructure Australia – http://infrastructureaustralia.gov.au/policy-publications/public-private-partnerships/index.aspx

NSW Department of Treasury – http://www.treasury.nsw.gov.au/ppp

Queensland Department of Treasury – https://www.treasury.qld.gov.au/

Victoria Department of Treasury and Finance – http://www.dtf.vic.gov.au/Infrastructure-Delivery/Public-private-partnerships

[10] http://www.pc.gov.au/inquiries/completed/infrastructure/report
[11] KPMG 'Public Private Partnerships: Emerging global trends and the implications for future infrastructure development in Australia' June 2015 https://www.kpmg.com/au/en/issuesandinsights/articlespublications/pages/public-private-partnerships-global-trends.aspx.

OTHER RECENT INNOVATIONS AND TRENDS

The last decade has seen a movement away from the adversarial 'hard money' form of contracting (and the consequential disputes which arise) to relationship based models.

While not all projects are suited to such a model, in Australia the state and federal governments have now utilised relationship based contracting models on a number of different projects ranging from roads to museums and railway upgrades.

Two examples of the relationship based model are alliance contracting and hybrid collaborative models.

Alliance contracting

Alliance contracting is a form of relationship contracting which has been used successfully on many major infrastructure projects in Australia over the last 15 years.

One of the first alliance contracts in Australia was the Northside Storage Tunnel delivered by Sydney Water in 1997. Examples of projects recently completed or currently being delivered in Australia using the alliance model are the Gateway WA Perth Airport and Freight Access Project (A$1 billlion), the Victorian Level Crossing Removal Project (A$10 billion) and the Hunter Expressway Alliance in NSW (A$1.7 billion).

A genuine alliance framework features the following core characteristics:

- Collective responsibility – the collective assumption of all risk relevant to the success of the alliance.
- No dispute – a robust 'no dispute' regime which requires the alliance leadership team to ensure all issues are unanimously resolved within the alliance.
- Integrated team – an integrated, collaborative team with the owner participant meaningfully participating in the alliance team which is in turn committed to maintaining a high performance culture.
- Best for Project – defined 'Best for Project' focus with principle-based decision making.
- Meaningful principles – clear principles that assist effective and efficient decision making with behavioural commitments provided and stated separately.
- Reward commensurate with alliance performance in the owner participant's project objectives – a commercial framework that aligns the commercial drivers of a non owner participant (NOP) with the creation of value outcomes for the owner participant and which allows NOPs to have an equitable share in these value outcomes.
- Clear governance – a transparent and robust governance framework matched to the challenges of the project.

Not all projects are suitable to an alliance. If, for example, the core characteristics are assessed by the proprietor as providing a higher likelihood that value will not be delivered under an alliance, then a risk allocated delivery mechanism may be more appropriate for their particular project.

An alliance framework can be used for the delivery of construction work, services or a program of works or services. An alliance is often appropriate where the project faces risks including:

- A challenging delivery schedule or environment.
- Excessive external stakeholder demands and expectations – for example high profile, politically controversial projects and/or projects that impact on many stakeholders and a substantial section of the community.
- The need for innovative solutions – for example for brownfield environments or where there may be limited space.
- A need to capture and explore emerging technology – such as toll projects, tunnels, defence projects and transport integration projects.

- A requirement for scope flexibility – for example where the owner participant has not been able to do all the necessary cost/benefit analysis, or if there is political pressure to start before final scope definition.
- Where the necessary resources are not available from one organisation requiring the contribution of multiple organisations – this occurs for most 'mega' projects, and technically challenging projects like bridges, tunnels, pipelines, mixed building and civil projects.

In response to a concern that outturn cost more often than not exceeds the target cost, there have recently been examples of alliance projects where one or more non owner participant has been prepared to impose a maximum cap on the outturn cost. The same incentives and gainshare apply, but the owner obtains more certainty in relation to project cost.

USEFUL REFERENCES

National Guidelines for Infrastructure Project Delivery – https://infrastructure.gov.au/infrastructure/ngpd/index.aspx

Australian Procurement and Construction Council – www.apcc.gov.au

Collaborative Agreements

More recently there has been interest in delivering projects on a more collaborative basis but without adopting a full project alliance model. These kinds of 'hybrid' contracts can take many different forms but in most instances will:

- Incorporate elements of a traditional risk allocated contract.
- Not include the 'no dispute' framework and instead utilise a stepped or escalating dispute resolution clause.
- Replace the collective assumption of risk typical of a project alliance with an intergrated risk managment framework whereby the principal and the contractor take on specified risks following a detailed risk review and pricing performed by the contractor during the tender process.
- Replace the shared governance arrangments with a collaborative leadership group which is not a decision making or governance body.
- Incorporate many elements of an 'alliance type' compensation framework for example by including a reimbursable cost framework with maximum target costs and target costs. There are also instances where the pricing structures will include fixed prices, schedules of rate and guaranteed maximum prices.
- Include detailed provisions requiring collaboration and integration between teams.
- Require a high level of transparency (such as open book and audit) between the parties in terms of costs, project delivery and outcomes achieved.

These agreements are a response to a perception that on the one hand costs can be diffcult to control under an alliance contract but that on the other hand, there are many elements of an alliance which drive more collaborative behaviours and better project outcomes than a traditional form of contract.

AVOIDING, MANAGING AND RESOLVING DISPUTES

Disputes arising out of infrastructure projects tend to involve many complex and interrelated issues, extensive documentation and the need for technical and expert involvement in any dispute resolution. This has the effect that such disputes are costly and time consuming. This has in turn placed greater demands upon the court system. In Australia the courts, lawyers, and parties to disputes have for years sought to achieve cost efficient and timely resolution of disputes. As a result Australia has often been at the cutting edge of developments in alternative dispute resolution (**ADR**).

Over the last 20 years there have been experiments with many forms of dispute resolution. Some forms have been imposed by courts and others by agreement. While there is no one solution, a party to a dispute arising from an infrastructure project in Australia may avail itself of a number of different options for resolution of that dispute.

Most infrastructure contracts (and all contracts for government funded projects) contain dispute resolution clauses permitting the parties to escalate their dispute by stages and which are structured so that a party may not pursue its claim in court (except for injunctive court relief) until it has fulfilled each step of the process. Many government agencies are obliged to comply with policies requiring 'model litigant' conduct. This means that a government agency must handle claims promptly and fairly without delay, participate in ADR where appropriate and keep the costs of litigation to a minimum.

A typical infrastructure contract is likely to require:

- Parties to issue a notice of dispute in a timely way with details of the nature and extent of the claim.
- Good faith negotiations between senior executives.
- Mediation or some other informal dispute resolution mechanism, for example, for the dispute to be heard by a dispute review board or a hearing by a technical or legal expert.
- Expert determination (often limited to disputes in relation to technical matters).
- Completion of these steps before proceeding to litigation or arbitration.

The following is a summary of the main dispute resolution models and processes used for disputes in Australia.

Litigation

Courts operate at both federal and state government levels. The separation of powers means that courts are independent of and separate to parliament and the executive government.

In most cases, the jurisdiction of a court is governed by the amount in dispute or, in the case of the Federal Courts, the subject matter of the dispute. In Australia, the highest level Court in each state (usually called a Supreme Court) has inherent jurisdiction to resolve a dispute. Courts also hear disputes in relation to security of payment issues, including appeals from an adjudicator's determination. (See Page 34)

In some jurisdictions, industry specific tribunals have power to hear disputes (for example the Land and Environment Court in New South Wales and the Domestic Building List in the Victorian Civil and Administrative Tribunal).

Unless the parties specifically agree to refer a dispute to arbitration by means of a provision inserted in the relevant contract, a claim can only be pursued in a court.

In Australia, the court system operates on an 'adversarial' basis. This means that the parties involved in the proceeding retain advocates who seek to persuade an impartial judge of the merit of their position. They do this by examining witnesses and representatives of the parties and applying strict rules of evidence. This is in contrast with the 'inquisitorial' system used in civil law systems in much of Europe.

Each court has its own rules applicable to the commencement, management and trial of a proceeding. The claim (called pleading) and all documents issued to articulate or rebut that claim must be in a particular and specified form. A fee is payable to commence a proceeding. Although judges do not charge to hear a proceeding, some courts now impose a court hearing fee.

In many jurisdictions, specific lists have been established by the courts to manage specific disputes such as building, technology or insurance disputes. These lists are managed by a judge with experience in hearing such disputes, and are intended to enable prompt hearing of interlocutory or preliminary arguments, assist with the quick identification of the issues and enable a hearing date to be obtained at the earliest possible time. Proceedings are listed regularly, sometimes each month at directions hearings, which the parties are obliged to attend. At this time, the court will make inquiries on the progress of the proceeding and make any necessary orders for the management of the matter including its trial. Such preparatory steps include provision of particulars, cross-claims, discovery of documents and the preparation of statement of evidence.

The purpose of these steps is to avoid ambush at trial, and to ensure each party knows all evidentiary matters upon which the other party will rely in advance of trial so, if appropriate, settlement discussions may occur.

These specialist lists may incorporate a number of special features to enable prompt and timely settlement of disputes, such as:

- Referral to compulsory mediation.
- If appropriate, determination by the court of a preliminary point in order to dispose of the dispute or limit the issues in dispute.
- Referral to a special referee to consider key technical questions.
- Dividing the proceeding into an assessment of liability and then quantum (if the claim is successful). This last step is unusual but may occur where determining liability is straightforward and the issue of damages is complex or lengthy.

While some courts will grant a trial date at the first directions hearing, in other courts there may be a time delay of up to two years until the trial commences. The timing for a trial can depend on the court's resources, the nature of the dispute, and how long the trial is likely to run.

In Australia, legal costs are said to 'follow the event'. This means that the party which successfully brings or defends a claim is likely to obtain a judgment that the other party pay its costs. The costs which are usually payable under such a judgment are usually 'party/party' costs. These amount to about 60% of the actual costs incurred by the successful party.

Other cost orders may be made. For example, if the successful party had earlier made an offer to settle the dispute on terms which were more favourable to the unsuccessful party than the judgment ultimately obtained, the successful party may obtain an order that part or all of its costs be paid on a 'solicitor/client' or 'indemnity' basis. Such an order might enable the successful party to recover up to 80 or 90% of its actual legal costs.

Time for issue of proceedings – limitation periods

In each state of Australia, legislation imposes a time period by which proceedings must be issued for a claim or dispute. These time periods vary from state to state. A failure to issue proceedings before the relevant time period expires is likely to result in that claim becoming 'time barred'.

In most Australian states, actions in simple contract or tort must be brought within six years of either the date of breach (contract) or the date on which loss was incurred (tort).

Domestic Arbitration

Arbitration is private – the outcome remains confidential and the awards which are handed down by an arbitrator are not published. This makes it an attractive form of dispute resolution to parties like government agencies or those involved in sensitive disputes.

Because the relevant court would otherwise have inherent jurisdiction over a dispute, parties must expressly agree to use arbitration as the means of resolving their dispute in their commercial contract. This agreement usually takes the form of a clause in the contract setting out an agreement to arbitrate any dispute which arises under the contract.

Arbitration is regulated in each state in Australia by domestic arbitration legislation. In 2010 the state and Federal governments agreed to adopt a consistent and uniform national framework for arbitration based on the UNCITRAL model law (**Commercial Arbitration Acts**). Acts to establish this regime have now been enacted in each state and territory.

The Commercial Arbitration Acts have made a number of improvements to the domestic arbitration system. In particular the new regime:

- Maintains the confidentiality of an arbitration.
- Limits the basis upon which an arbitral award may be appealed.
- Provides for easier enforcement of arbitral awards.
- Gives arbitrators additional powers, such as the power to issue interim orders.

- Requires a court to stay a parallel proceeding provided certain matters are established.

Domestic commercial arbitration is usually conducted on a very similar basis to litigation, with similar procedures, legal representation, and costs. In addition to confidentiality, another significant difference between litigation and arbitration is that an arbitrator charges a fee to hear the claim and prepare the award. In the case of arbitration, usually the suite of rooms needed (e.g. hearing room, arbitrator's office and rooms for each of the parties) will need to be hired. The arbitrator's fees and room hire costs can be significant. However, arbitrations can be heard promptly and disputes resolved in weeks or months, not years.

Arbitrators are often solicitors, barristers or retired judges. In the construction industry, experienced engineers, architects and other building professionals with arbitration expertise are also often used.

International arbitration

International arbitration is governed by the *International Arbitration Act 1974* (Cth) (**IAA**). This legislation confirms Australia's adoption of, and signatory to, the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards. The IAA provides that an arbitration is international if any of the circumstances set out below apply:

- The parties to an arbitration agreement have their place(s) of business in different countries.
- The place of arbitration determined in an arbitration agreement is outside the country in which a party's business is located.
- The place where the commercial obligations are to be performed is outside the country in which a party's business is located.
- The parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

Currently in Australia, the types of commercial disputes which tend to use international arbitration are iron ore supply contract disputes or other mining supply disputes, although this is changing as Australia's economy transforms.

The key functions of the IAA are to:

- Give effect to the New York Convention. This has two important effects. First, it permits parties to apply for judicial proceedings issued in Australia to be stayed if they are brought in breach of an arbitration agreement, for example, if the parties have otherwise agreed to arbitrate their dispute. Second, it allows foreign arbitral awards to be enforced in Australia in a broad range of circumstances.
- Enact, by incorporation, the UNCITRAL Model Law on international commercial arbitration (which has now been adopted in over 30 countries). The model law gives the parties flexibility to create their own arbitration processes and imposes minimal prohibitions and requirements on parties for the conduct of their arbitration. Australia has adopted these without amendment.
- Enact, by incorporation, the ICSID Convention (International Convention on the Settlement of Investment Disputes) to permit arbitration of an investment dispute between a country and a national of another country. The IAA also confirms that Australia must enforce and recognise as relevant, awards made in other countries under an ICSID arbitration.
- Deal with other minor matters such as liability of arbitrators and rights of representation.

Sydney and Melbourne operate as centres for international arbitration. The Australian Centre for International Commercial Arbitration (ACICA) provides international arbitration services. The ACICA rules are based on the 1976 UNCITRAL Arbitration Rules. Other providers used by Australian parties are the International Court of Arbitration, the London Court of International Arbitration and the Singapore International Arbitration Centre.

International arbitrations are run on a similar basis to domestic arbitration, although the following features are more commonly used:

- A panel of arbitrators.
- A 'stop clock' procedure where the parties must make their submissions and lead evidence from witnesses within a short time frame, for example 10 days.
- The incorporation of terms of reference which are agreed following the appointment of the arbitrator or arbitrators.

Mediation

Mediation is a form of alternative dispute resolution which requires the participation of a third party (a mediator), whose role is to assist the parties to a dispute to reach agreement on the resolution of that dispute. A mediator does this by seeking to align the parties' interests, where possible, identifying the possible outcomes of the litigation or arbitration, and examining what options might be available to the parties to settle the dispute.

A mediator does not make a binding determination on the dispute, although he or she may make observations on the strength or weakness of the parties' respective positions. Mediation is usually conducted on a confidential basis. In Australia, mediators tend to be senior barristers, solicitors or retired judges.

A mediation:

- Allows each party to test the strength of its case on a neutral third party.
- Gives the parties a forum to articulate their claim in an informal environment.
- Gives an opportunity for discussions to occur between a level of management higher than the 'coal face'.
- Permits the parties to explore means of resolution which are not simply reliant on payment of money or performance of work.
- Can help to preserve a commercial relationship before the parties' positions become entrenched at trial or arbitration.

A key element of mediation is its consensual nature. If both parties sincerely want to mediate their dispute then the prospects of settlement are probably higher.

In Australia, there has been a marked trend towards court ordered mediation over the last decade. This trend has developed in response to pressure on court resources and is particularly acute in the context of major, multi-party disputes. While this trend flies in the face of a consensual approach and may result in the forced participation by parties in the mediation process, statistics produced by the courts show that a high proportion of disputes settle at mediation.

Mediation has been so successful that many infrastructure contracts now contain a clause requiring the parties to mediate their dispute prior to taking any formal steps in litigation or arbitration.

Proportionate Liability

Since 2004, all states and territories have enacted proportionate liability legislation relating to economic loss or property loss claims arising from negligence or tort, and for damages arising out of misleading and deceptive conduct. Proportionate liability replaces the common law doctrine of joint and several liability. The doctrine of several liability had the effect that a claimant could recover all its loss and damage from one respondent party even if that party was not responsible for all the relevant loss and damage. Proportionate liability on the other hand, allows liability to be apportioned between 'concurrent wrongdoers' according to their respective responsibility for the loss or damage.

The proportionate liability legislation is important because many major infrastructure disputes involve more than two parties. A claimant needs to understand the effect of the legislation on its prospects for full recovery of its loss and damage, particularly if there are varying levels of liquidity or insurance arrangements between all the defendants.

The legislation impacts on many issues in a project, from the indemnity and warranty clauses through to the dispute resolution clause, to how and if a decision to join other parties into a proceeding is made if a dispute arises.

There are significant differences in the way proportionate liability applies in each jurisdiction. Specifically, the ability of parties to 'contract out' of proportionate liability varies across jurisdictions. A decision to 'contract out' of the legislation can have a significant impact on a party's insurance arrangements. Contracting out may mean that the cover for a claim is limited or non-existent.

USEFUL REFERENCES

Australasian Institute of Judicial Administration – www.aija.org.au
Australian Centre for International Commercial Arbitration – www.acica.org.au
Association of Dispute Resolvers – www.leadr.com.au
Chartered Institute of Arbitrators Australia – www.arbitrators.org.au
London Court of International Arbitration – www.lcia.org
The Institute of Arbitrators and Mediators Australia – www.iama.org.au

FORMS
OF CONTRACT

The Australian infrastructure market is dominated by standard form contracts, which are prepared and issued by various industry bodies. These standard forms are used by both government and the private sector, have a widely understood risk allocation and have in many cases been the subject of judicial comment. The most commonly used standard forms are:

- Australian Standards contracts (issued by Standards Australia) – forms range from construct only, to design and construct, construction management, supply and subcontract.
- PC-1 1998 – which is published by the Property Council of Australia.
- Australian Building Industry Contract **(ABIC)** – which is a joint publication of the Master Builders' Association and Royal Australian Institute of Architects.
- Forms issued by the Master Builders Association (MBA) and the Housing Industry Association – these are usually used for smaller residential, commercial or industrial projects.
- FIDIC forms of contract (EPC, design build, construction, electrical and mechanical and civil engineering) – these are occasionally used, particularly on large infrastructure projects involving offshore contractors.
- GC-21 (NSW Government) – this form of contract is used by many NSW government agencies for various types of projects, ranging from A$1 million to in excess of A$50 million.

Other less commonly used standard forms include NPWC (National Public Works Committee) construct only contract and the UK NEC (New Engineering Contract) standard form templates.

While these standard forms are periodically updated and reissued, many of the commonly used forms are more than 10 years old. As a result, these standard forms are typically amended by the insertion of special conditions in order to tailor or adjust the risk allocation, take account of legislative change or to address project specific needs. It is now unusual for any major project to be delivered using a standard form contract which has not been extensively amended. Many large principals (both government and private sector) have their own 'standard form' contract incorporating detailed special conditions to address project and risk requirements and specific commercial drivers.

There are no commercially available standard form contracts applicable to forms of delivery such as alliance contracting, PPP and for hybrid delivery forms such as ECI. These are generally prepared on a project by project basis. Some agencies which use these methods of procurement frequently will tend to use the same form of contract repetitively.

A number of government agencies which procure infrastructure have suites of pro forma or standard contracts for use on their projects. For example, the federal Department of Defence has an extensive suite of contracts for use on the full spectrum of defence procurement projects.

USEFUL REFERENCES

ABIC – www.architecture.com.au
Department of Defence – www.defence.gov.au/im
FIDIC – www.fidic.org
MBA – www.masterbuilders.asn.au
Property Council of Australia – www.propertyoz.com.au
Standards Australia – www.saiglobal.com

FINANCING PROJECTS

Options available to finance infrastructure projects in Australia are very similar to those available in other jurisdictions like the UK. Project funding consists of a combination of equity and debt. Project debt, corporate debt and bonds are the main sources of debt. Other forms of indebtedness may be utilised for plant and equipment (such as asset finance or hire-purchase arrangements) or the debt may be subordinated (for example through mezzanine facilities or subordinated shareholder loans). In this section we focus on senior funding for core project costs.

PROJECT FINANCE

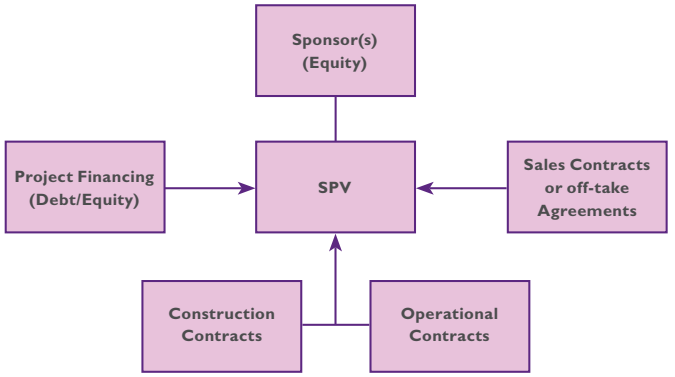
Generally, project sponsors prefer debt to be secured on a limited-recourse basis. Limited-recourse means that financiers only take security over the assets of the project itself and its outputs (including revenue) rather than any wider assets of the sponsor and its corporate group This preference is largely driven by the fact that it is only the project's assets and revenues which are 'at risk' of enforcement. This approach enables project sponsors to retain flexibility with respect to their other ventures.

A common structure for project finance involves incorporating a special purpose vehicle for the project (**Project Co**). The Project Co then enters into a range of documents for the delivery of the project including the *project documents* (relating to construction and operation of the project) and the *finance documents* (relating to the financing of the project).

In order to secure this funding, the project needs to stack up from a 'bankability' perspective. In essence, bankability is a term used to describe:

- the willingness of financiers to fund the project based on security of cash flows (in and out) of the project; and
- the minimisation of any residual risk held by the Project Company receiving the funding.

Bankability considerations will differ depending on the nature of the project and the identity of the financiers and is only understood after modelling, technical due diligence and legal due diligence (including reviewing the proposed project documents such as the project deed, construction contracts and operational contracts) is completed.



In Australia, limited recourse debt is largely sourced from Australia's 'Big 4' domestic banks – Westpac Banking Corporation, Australia and New Zealand Banking Group, Commonwealth Bank of Australia and National Australia Bank – along with participation from Japanese and Chinese banks and export credit agencies.

CORPORATE FINANCE

Debt based on corporate finance facilities may be utilised where a project is not sufficiently bankable to receive limited recourse finance. Such facilities may be made on an aggregated basis so that a variety of smaller projects create a portfolio of assets. Recourse for the financier to security is limited to the security based on that portfolio of assets with all assets being cross-collateralised. Alternatively, such facilities can be full recourse, meaning financiers may have recourse against all assets of the relevant companies within the corporate group of the Project Co.

Corporate finance can be accessed following a traditional credit assessment by financiers including assessment of debt to equity ratios, leverage and interest cover ratios and an assessment of enforcement risk. Under a full recourse corporate finance facility, the borrower group is typically restricted from any future dealings that might reduce the security value of the corporate group including restrictions on incurring further indebtedness, disposing of assets or entering into material transactions.

In Australia, the legal documentation for corporate finance is dominated by variants of the Asia Pacific Loan Market Association (**APLMA**) precedent facilities agreements.

BONDS

While debt based on bond funding is available for project finance, the Australian bond market:

- Currently lacks longer tenor instruments to provide the long term certainty that is often desired in the infrastructure project finance market.
- Is often considered too small to support the funding needs of Australia's mega projects.

It is now becoming increasingly common for those seeking bond debt to access the US and Asian bond markets instead.

Bonds are often seen as attractive as they can be obtained at a lower margin and for a longer tenor and often have less restrictive covenants. The 'credit assessment' of a bond is undertaken by ratings agencies who assess the rating for the bond and the resultant pricing.

SECURITY

Security interests in Australia are predominantly regulated at the Federal Government-level by the Personal Property Securities Act 1999 (Cth) (**PPSA**).

Notably, the PPSA does not apply to land and certain statutory licences (like mining tenements and permits), therefore mortgages over land or security interests over mining rights are still registered and regulated by State and Territory Government authorities.

USEFUL REFERENCES

Asia Pacific Loan Market Association – www.aplma.com

Banking and Financial Services Law Association – www.bfsla.org

Personal Property Securities Register – www.ppsr.gov.au

TAXATION FOR INFRASTRUCTURE PROJECTS

Businesses carrying out infrastructure projects in Australia need to properly consider the Australian tax consequences of those projects, including income tax, withholding tax, goods and services tax (GST) and stamp duty.

KEY INCOME TAX ISSUES FOR THE INFRASTRUCTURE INDUSTRY

The key Australian income tax issues relevant to the infrastructure industry are summarised below.

Entity Type

The type of entity used in carrying out the infrastructure project will often determine the principal Australian tax implications. Commonly, entities or a combination of entities such as companies, trusts (either flow through or taxed as companies), limited partnerships and joint ventures may be used to carry out infrastructure projects. Also, stapled structures (where investors hold interests in two or more entities and these securities cannot be bought or traded separately) are frequently used in carrying out these projects.

Each of these entities, or a combination of entities, have distinctive tax characteristics which must be carefully examined to determine its appropriateness in carrying out the particular infrastructure project from an Australian tax perspective. The optimal structure for tax purposes will likely be determined by a number of factors including risk allocation, projected financial data, external financing and ultimate ownership of the project.

Capital Allowances and Capital Works Deductions

Under the capital allowance regime, the decline in value of income-producing assets is generally tax deductible over the asset's estimated useful life. Similarly, deductions are available over longer periods under the capital works regime for certain capital expenditure on income-producing buildings and structures.

However, there is a specific regime (referred to as Division 250 contained in the *Income Tax Assessment Act 1997* (Cth)) which denies or reduces certain capital allowance deductions that would otherwise be available for an asset in certain circumstances. Division 250 applies if the asset is put to a 'tax preferred use' and the taxpayer has an insufficient economic interest in the asset. Broadly, this may occur where the end user (such as a lessee of the asset) is a tax preferred end user (for example, a tax exempt government agencies) or the asset is to be used wholly or principally outside Australia by a non-resident.

Interest Deductions

Generally, interest is deductible if it is incurred in gaining or producing assessable income or in carrying on a business for that purpose and is not of a capital, private or domestic nature. On this basis, interest expenses incurred in respect of an infrastructure project should generally be deductible against assessable income in the year in which they are incurred where the loan is used to acquire income producing assets (including capital assets), to

finance business operations or to meet current business expenses. This is subject to the operation of the thin capitalisation and transfer pricing rules discussed below.

Tax Losses

Company and trust losses are effectively 'trapped' within these entities (subject to potential tax consolidation discussed below). Tax losses incurred in an earlier year by a company or trust may generally be deducted against income derived in a subsequent income year. This is subject to a couple of qualifications. These qualifications principally relate to the satisfaction of a continuity of ownership test (COT), or in certain circumstances, the same business test (SBT). Broadly, the COT requires that shares carrying rights to more than 50% of all voting power, rights to dividends and rights to capital distributions, be beneficially owned by the same persons at all times during the 'ownership test period'. The ownership test period is the period from the start of the year in which the loss was incurred to the end of the income year (that is, the year that the loss was recouped).

If the company fails the COT, it may still be able to claim a deduction for prior year losses if it satisfies the SBT. Broadly, a company will satisfy the SBT if it carries on the same business in the year in which the losses are recouped as it carried on immediately before the COT was failed (SBT Period). Further, the company will not satisfy the SBT where it derives assessable income during the SBT Period from a business different to the business it carried on before the time the COT was failed or from a transaction different to the transactions it entered into in the course of its business operations before the time the COT was failed.

Depending on the type of trust, most trusts are unable to carry forward tax losses for future recoupment unless they satisfy the 50% stake test. In order to pass the 50% stake test, the same individuals must directly or indirectly hold fixed entitlements to more than 50% of the income and capital of the trust at requisite times. Listed widely held trusts can use the SBT as an alternative to carry forward tax losses if they fail the 50% stake test.

Due to the nature of infrastructure project, many project entities accumulate significant tax losses in the early years of a project. Therefore, it is crucial that the loss Integrity rules are considered in designing the structure to undertake a project or any transactions relating to a project entity.

Debt/Equity Rules

Division 974 of the *Income Tax Assessment Act 1997* (Cth) operates to classify certain financial arrangements as debt or equity for income tax purposes so that 'returns' on arrangements classified as 'debt interest' are generally treated in the same way as interest paid on a loan. In turn, 'returns' on arrangements classified as 'equity interests' are treated as dividends paid on a share. These rules are designed to replicate the economic characterisation of an instrument (that is, a substance over form approach) and may, in some circumstances, differ from the accounting treatment of an instrument as being debt or equity.

Therefore, in order to determine the taxation treatment of a financing structure, it is necessary to assess whether the debt or equity components of the funding will be treated as such for tax purposes.

Consolidation Regime

For income tax purposes, an Australian head company of a wholly owned group of entities can elect to consolidate with its wholly owned Australian subsidiaries. Under a 'one-in, all-in' principle, the wholly owned subsidiaries become subsidiary members of the consolidated group. Together with the head company, these constitute the members of the group and, while consolidated, will broadly be considered a single entity for tax purposes. There may be advantages in certain circumstances in consolidating for tax purposes.

Thin Capitalisation

Broadly, thin capitalisation rules operate when the amount of debt used to finance the Australian operations of multinational corporations exceeds specified limits. These disallow a proportion of the deductible finance expenses, for example interest attributable to the Australian operations.

The rules may apply to:

- Australian entities that are foreign controlled, and foreign entities that either invest directly into Australia or operate a business through an Australian permanent establishment.

- Australian entities that control foreign entities or operate a business through overseas permanent establishments and associate entities.

There are two exemptions which are excluded from thin capitalisation rules:

- Taxpayers and their associates claiming annual debt deductions of A$2,000,000 or less.
- Outward investing Australian entities, if at least 90% of their assets excluding those of a private or domestic nature are Australian.

For entities carrying out infrastructure projects, debt deductions reduce where the amount of debt funding of Australian operations exceeds a specified maximum. This specified maximum varies according to whether the entity is inward or outward investing.

The maximum deductible debt amount an entity that is subject to the thin capitalisation rules is permitted is the highest amount determined under either the:

- Safe harbour debt test.
- Arm's length debt test.
- Worldwide gearing debt test.

Under the safe harbour debt test, the maximum allowable debt will generally be equal to 60% of the value of its Australian assets (that is, a gearing ratio of 1.5:1).

The arm's length debt amount is determined by analysing an entity's activities and funding to deliver a notional amount that represents what would reasonably have been expected to be the entity's maximum arm's length debt funding during the period.

The worldwide gearing debt test allows an entity with to fund its Australian investments with gearing of up to 100% of the gearing of the worldwide group it controls.

Transfer Pricing (Shifting Profits Out of Australia)

Under Division 815 of the Income Tax Assessment Act 1997, if an entity receives a transfer pricing benefit, the tax law will operate to negate that benefit and instead treat the taxpayer as if the arrangement that gave rise to the benefit was on arm's length terms. A transfer benefit can arise if a cross border arrangement is not on arm's length terms and reduces taxable income in Australia or gives rise to a reduced withholding tax amount.

In the infrastructure context, this means that any financing, management charges or supplies of goods or services by foreign investors to related Australian companies must be commercially justifiable and at arm's length prices. Several pricing methodologies (including both transactional and profit based methods) exist which are acceptable to the Australian Taxation Office (ATO) depending on the circumstances.

WITHHOLDING TAX

Distributions of franked dividends (that is, dividends paid out of previously taxed profits) are exempt from Australian withholding tax. Distributions of unfranked dividends, interest and royalties by an Australian entity to a foreign investor, may be subject to Australian withholding taxes of 30%, 10% and 30%, respectively. However, where the foreign investor is resident in a country with which Australia has a double tax agreement, these rates of withholding are often lower.

Certain distributions from Australian managed investment funds (that is, trusts) to foreign investors qualify for a reduced rate of withholding. This applies to "fund payments" which are predominantly rental income and capital gains. Essentially, the non-final 30% withholding tax is reduced to a 15% final withholding tax.

To be eligible for this significant reduction in the Australian withholding tax for these distributions from Australian managed investment trusts (principally 'managed investment schemes'), the foreign investor must be resident in a country with which Australia has an effective arrangement for the exchange of information on taxation matters. In addition, the trust needs to be widely held or have at least one specified type of member (e.g. a life insurance company or superannuation fund).

GOODS AND SERVICES TAX (GST)

GST is a value-added tax of 10%. It is generally payable on 'supplies', including supplies of goods, services, real property, rights and obligations. GST is generally applied at each stage of the production and distribution chain. To calculate the GST on a supply, take one eleventh of the total price of the supply. The possibility of an increase in the GST to 15% has been widely discussed in Australia over the last 3 years.

GST has a significant impact on the profitability of an infrastructure project, as well as the choice of financing, the purchaser's cash flow, the amount of stamp duty payable and tax compliance costs. Accordingly, it is important that the investment and operational structure of a project minimises GST inefficiencies throughout the life of the project. GST must be considered prior to establishing a project structure, and it's particularly important that in the case of infrastructure projects, the special GST rules that apply to property, cross border arrangements and financial services are carefully considered in the early stages.

The design and construction of projects generally involve taxable supplies. GST considerations tend to be administrative in nature, such as registration of appropriate entities, payment system issues, cash flow issues, contract drafting and invoicing arrangements. Suppliers generally seek to recover the GST from the recipient. This amount is generally recouped by the recipient through an input tax credit from the ATO. However, input tax credits can be denied in some types of projects, in particular, in the finance and residential property sectors. In this case, GST is a real cost to the project.

The GST consequences of the operation phase of a project are more complicated and advice should be sought concerning both the GST treatment and the compliance aspects of the operations. The operations may involve taxable, GST-free or input taxed supplies.

An input taxed supply is one where there is no GST liability on the supply, however, the supplier is not able to claim full GST credits on expenses associated with the supply. An example of an input taxed supply is the lease of residential property. A GST-free supply is one where there is no GST liability on the supply and the supplier is able to claim GST credits on expenses associated with the supply. Examples of GST-free supplies include exports and the sale of a business as a going concern.

Another important aspect of the project is the GST consequences of the project finance. Generally, project finance falls within the GST financial supply rules. Financial supplies are generally input taxed (and therefore GST credits on project finance expenses are not able to be claimed). However, there are a number of special GST rules that apply in this area, for example, the Financial Acquisitions Threshold and the borrowings exemption.

STAMP DUTY

Stamp duty is a tax levied on certain transactions and instruments. It is imposed differently in each Australian state and territory and applies principally to transactions such as transfers of land and other property (e.g. unlisted shares, business assets). In some Australian jurisdictions, certain other transactions such as the taking of security for financial accommodation (e.g. mortgages and charges) may also be subject to stamp duty. In addition, transfers of unlisted shares are subject to duty in New South Wales.

All jurisdictions also levy duty on acquisitions of majority or significant interests in certain land-holding companies and/or unit trusts (referred to as 'land-rich' or 'landholder' duty). The threshold tests and specific rules for land-rich/landholder duty can be quite complex and again differ in each Australian jurisdiction.

Depending on the nature of the instrument/transaction and the value and location of the relevant property, the rate of duty is up to 7%. For transfers of property, duty is generally levied on either the consideration paid for the transfer or the unencumbered value of the property (whichever is greater). Generally, the transferee is liable for the payment of duty.

Instruments that are subject to duty will be required to be lodged for stamping with the relevant state or territory revenue authority. Instruments that are required to be registered (e.g. land transfers) must be duly stamped by the relevant revenue authority before the instrument can be registered.

USEFUL REFERENCES

Australian Taxation Office: www.ato.gov.au

Income Tax Assessment Act 1997 (Cth)

Income Tax Assessment Act 1936 (Cth)

A New Tax System (Goods and Services Tax) Act 1999 (Cth)

STATUTORY REGULATION OF INFRASTRUCTURE

A number of different statutes and regulations apply to infrastructure in different states and territories. Businesses operating across Australia can therefore be bound by many different laws and need to pay close attention to the legislative and operating environment applicable to their project.

The last 10 years has seen the development of legislation and regulations which tie Australian government funding to compliance with particular requirements or the obtaining of accreditation or other qualification in order to perform work the subject of such funding. For example, contractor compliance with specified industrial relations codes of practice is now required for all Australian government funded work. Similarly, occupational health and safety accreditation is required for all contractors performing work on Australian government funded projects. This extends to State or other agency projects which receive such funding.

The following areas of infrastructure are governed by legislation in most states and territories:

- Security of payment.
- Occupational health and safety.
- Registration and licensing of builders (residential and commercial).
- Residential building quality and the form and content of residential building contracts.
- Mining and extractive industries.

SECURITY OF PAYMENT

Each Australian state and territory has legislation dealing with security of payment (**SOP**) of contractors, suppliers and subcontractors in the infrastructure industry. SOP legislation was enacted in response to representations by subcontractor and contractor groups and studies which showed that there was widespread abuse of the contractual obligation to pay a contractor or subcontractor for work carried out, and perhaps more seriously, widespread use of clauses providing that a party would not be paid unless and until the party one link up the contractual ladder had been paid. New South Wales was the first state to enact SOP legislation in 1999.

While the detail varies from state to state, SOP Acts tend to have the following features:

- Enshrining a statutory right to payment for infrastructure work and services. In some jurisdictions, this right may exist in parallel to a similar existing right in the relevant infrastructure contract. In other jurisdictions it is only granted if the relevant contract contains no payment regime.
- Specifying a process which must be followed by both the party claiming under that statutory right, and the party who is liable to make payment.
- Prohibiting 'pay when paid' clauses and other clauses considered inconsistent with a contractor's right to be paid for work carried out.

- Prescribing a type of fast track dispute resolution in the form of adjudication of payment claims under contracts.

Some SOP Acts (such as those enacted in the Northern Territory and Western Australia) give a party a right to claim payment for infrastructure work or services only if the relevant contract does not contain any provision for payment.

In other SOP Acts, notably those in Victoria, New South Wales and Queensland, the statutory right exists regardless of the presence in the applicable contract of provisions giving a right to a party to claim payment for work and services. This statutory right sits in parallel with the contractual right to payment.

SOP legislation enacted in Australia has the following important impacts:

- It 'speeds up' certification of payment claims and requires contractors to have efficient contract administration processes.
- It improves the cash flow to subcontractors and suppliers, and means that contractors cannot rely on delaying payment to sustain cash flow and liquidity.
- It may have reduced the number of major litigated disputes as many of these may be resolved at the adjudication stage.

Depending on the jurisdiction in which the works are being carried out, most construction and infrastructure contracts need to contain provisions dealing with SOP. Such provisions will not be standard, as careful consideration needs to be given to the nature of the project and how the payment provisions are intended to work. For example:

- In some jurisdictions, imposing a precondition to payment of a contractor or subcontractor, such as the provision of insurance details or security, may be in breach of the relevant SOP Act.
- Not all construction work is covered by the relevant SOP Act. Notable exclusions to the operation of the SOP Act in most jurisdictions are mining work, residential building work and work where the payment under the contract is not the value of the work performed but some other mechanism (as may be the case in a build own transfer project or alliance contract).
- There still exists, in some jurisdictions, legislation which gives contractors a right to place a lien over property to secure payment (in the case of South Australia).

USEFUL REFERENCES

Building and Construction Industry Security of Payment Act 1999 (NSW)
Building and Construction Industry Payments Act 2004 (Qld)
Building and Construction Industry Security of Payment Act 2002 (Vic)
Construction Contracts (Security of Payments) Act 2004 (NT)
Construction Contracts Act 2004 (WA)
Building and Construction Industry Security of Payment Act 2009 (SA)
Building and Construction Industry Security of Payment Act 2009 (Tas)
Building and Construction Industry (Security of Payment) Act 2009 (ACT)

OCCUPATIONAL HEALTH AND SAFETY

The Commonwealth together with each state and territory has effected legislation to regulate occupational health and safety (**OHS**) in each jurisdiction. Each jurisdiction has a principal OHS Act which imposes general health and safety duties. These duties are performance based obligations rather than highly prescriptive requirements.

The primary OHS Act in each jurisdiction is supported by regulations and codes of practice applicable to particular industries or activities. Due to the high risk of serious injury associated with it, the infrastructure industry and many activities within it are subject to tight statutory regulation.

In 2008 the Council of Australian Governments committed to harmonising Australia's OHS laws. The Australian Government enacted the Work Health and Safety Act in 2011. As at October 2015, this Act has been adopted (with minor changes) by all states save for Victoria.

General obligations

The OHS legislation in each jurisdiction imposes duties on employers and employees (those working at the workplace and those who have sufficient control of the workplace) to ensure the health and safety of any person who might be affected by their actions. Generally speaking, in the infrastructure industry, OHS duties are imposed on:

- Employers to employees, contractors and employees of contractors. The duty to contractors extends past 'first level' contractors to subcontractors and their employees.
- Occupiers of workplaces to employees, contractors and their employees, and other entrants.
- Employers to those who may be affected by their undertakings.
- Those nominated as 'principal contractors' for a construction project.

Each jurisdiction requires that the duty holder under the relevant OHS Act must ensure the health and safety of those who may be affected so far as is reasonably practicable. In order to gauge what steps are 'reasonably practicable', the responsible party must conduct itself in accordance with generally accepted risk management principles. These include the need to balance:

- The likelihood of the hazard or risk occurring and the degree of harm that would result if the hazard or risk occurred.
- The knowledge of the hazard or risk and the ways to eliminate or reduce the hazard or risk.
- The availability and suitability of ways to eliminate or reduce the hazard or risk, and the cost of eliminating or reducing the hazard or risk.

Failure to comply with OHS obligations leaves the person, company (and potentially the director of a company) responsible; liable to criminal prosecution. OHS obligations are strictly enforced in each jurisdiction by statutory authorities with extensive investigative powers to visit workplaces and require production of documents. OHS authorities can also require work to be stopped to ensure safety at a construction site.

The infrastructure industry and construction activities

Specific regulations deal with construction activities because of the inherent risk of personal injury associated with the industry.

For example, Chapter 6 of both the Commonwealth and New South Wales Work Health and Safety Regulations, and Chapter 5.1 of Victoria's *Occupational Health and Safety Regulations 2007* deal with specific obligations on duty holders in the construction industry, and other state and territory regulations also impose specific requirements on the infrastructure industry. In some jurisdictions, such as New South Wales and Victoria, the regime includes the appointing of a principal contractor in certain projects to oversee OHS practices.

In addition, particular activities prevalent in the industry are also subject to specific regulations and licensing across Australia. These include working at heights, working with asbestos, welding, demolition, excavation, cranes and scaffolding.

REGULATION OF BUILDING CONTRACTORS

Most state governments have enacted legislation which governs and regulates building work and who performs it. Generally the focus of state governments has been on domestic and residential building which is characterised by many small contractors of limited liquidity, an imbalance in bargaining power between principals and contractors, and a high level of disputation as to time, cost and quality issues.

Many states and territories now have legislation which requires residential builders to be licensed, imposes statutory warranties in relation to building work quality and imposes detailed requirements on the form and content of the residential building contract.

In comparison, the commercial building sector is less regulated.

In general, the following regimes apply to non residential construction and the commercial building sector in each state or territory:

- A requirement to be registered or licensed as a builder in the relevant jurisdiction before building work can be carried out. In some cases the registration is personal, that is, it attaches to an individual officer of the contractor. Also in some cases the requirement to be registered extends to project and construction manager type roles.
- Restrictions are imposed on using the word 'builder' and a requirement that building work be 'supervised' by a person who is registered.
- In most jurisdictions, persons who carry out specialised work such as plumbing, gas fitting and electrical work must hold the appropriate licence or registration.
- A time frame within which any litigation connected with a building dispute must commence, is imposed in some states.
- In some cases, there is an obligation to take out and maintain certain types of insurances (for example in Victoria, commercial builders must take out structural defects insurance).
- Many jurisdictions have established statutory bodies who monitor compliance with the licensing and registration regimes.
- Penalties are imposed on parties who contravene these requirements (usually in the form of fines and sometimes loss of registration or licence).

MINING AND EXTRACTIVE INDUSTRIES

For further information on mining and extractive industries and regulation, please see the Mining and Resources chapter in section one of the Doing Business in Australia guide.

USEFUL REFERENCES

Construction Occupations (Licensing) Act 2004 (ACT) and *Building Act 2004* (ACT)
Building Act 2000 (Tas) and *Housing Indemnity Act 1992* (Tas)
Building Act 2007 (NT)
Building Work Contractors Act 1995 (SA)
Building Act 1993 (Vic) and *Domestic Building Contracts Act 1995* (Vic)
Builders Registration Act 1939 (WA)
Building Commission Victoria – www.buildingcommission.com.au
Home Building Act 1989 (NSW)
Queensland Building Services Authority Act 1991 (Qld) and *Domestic Building Contracts Act 2000* (Qld)
Queensland Building Services Authority – www.bsa.qld.gov.au

INDUSTRIAL RELATIONS

LABOUR MARKET REGULATION AND REFORM

The effective regulation of labour relations in the construction industry has been a matter of considerable discussion and debate in Australia for many years. It is well recognised that the ability to deliver the many infrastructure projects on the agenda for Australia depends in large part on effective labour relations that deliver predictable budgets and time lines.

Following a period when the building and construction industry was recognised as one with a poor record, with industrial disputation with unions and unlawful strikes, more recently, there has been much improvement driven in large part by regulatory reform and the introduction of an industry specific 'policeman'.

The Australian Building and Construction Commissioner (ABCC) established under the *Building and Construction Industry Improvement Act 2005* (Cth) (BCII Act) has had a significant impact on the industry. The ABCC was a special regulatory authority with substantial investigatory and prosecutorial powers that had been active since 2005 and has launched many proceedings seeking not insubstantial penalties against one or more building industry participants. Most of the completed proceedings have been successful.

From 1 June 2012, the ABCC was replaced by Fair Work Building and Construction (FWBC). FWBC remains the current building industry regulatory body. Reflecting a scaling down of its prosecution powers, the principle role of the FWBC is to provide a balanced framework for co-operative, productive and harmonious workplace relations in the building industry.

Some key features of the labour market in building and construction are:

- Employers may restrain unlawful strikes by applying for an order under the BCII Act or by issuing common law injunctions.
- 'General protections' against discrimination type activity (the right to become a member of a union or industrial association or not) is provided for in the *Fair Work Act 2009* (Cth) (FW Act).
- An employer may not dismiss an employee in circumstances which are 'harsh, unjust or unreasonable', i.e. unfair.
- Federal and state legislation prohibit sexual harassment and discrimination on any grounds including sex, marital status, impairment or imputed impairment, religious or political beliefs, race, pregnancy and age.
- The *Equal Opportunity for Women in the Workplace Act 1999* (Cth) also requires employers with 100 or more employees to develop and implement an affirmative action program.

From 1 July 2009, the FW Act commenced operation, bringing in many changes to the bargaining and industrial

relations landscape within Australia. Significantly for the construction industry, employer only greenfields agreements can no longer be made. Union greenfields agreements remain a bargaining option for new projects together with the possibility of making multi-employer agreements for a project covering the principal contractor and named sub-contractors. For a full overview on these reforms and employment regulations in general, please see the Employment Chapter in Section One of the Doing Business in Australia Guide.

The FW Act also introduced from 1 January 2010, ten National Employment Standards (NES) for all employees. The ten NES together with modern awards set out the minimum terms and conditions of employment for employees in the construction industry.

The NES provides for entitlements in regards to the following matters:

- Maximum of 38 weekly hours of work—plus reasonable additional hours.
- Requests for flexible working arrangements—in certain circumstances employees can request a change in their working arrangements.
- Parental leave and related entitlements.
- Annual leave – 4 weeks paid leave per year plus an additional week for certain shift workers.
- Personal/carer's leave and compassionate leave.
- Community service leave—unpaid leave for voluntary emergency activities and up to 10 days paid leave for jury service (after 10 days is unpaid).
- Long service leave.
- Public holidays—a paid day off on each public holiday, except where reasonably requested to work.
- Notice of termination and redundancy pay.
- The Fair Work Information Statement to be given to new employees.

In addition to these matters there are four modern awards that, from 1 January 2010, cover on-site work in the building and construction industry. The four awards are the *Building and Construction General On-site Award 2010,* the *Electrical, Electronic and Communications Contracting Award 2010,* the *Plumbing and Fire Sprinklers Contracting Award 2010* and the *Mobile Cranes Hiring Award 2010*. The *Building and Construction General On-site Award 2010* is the primary award that will apply on most building and construction sites covering both the civil and general construction areas of the industry.

INDUSTRIAL RELATIONS IN THE INFRASTRUCTURE INDUSTRY

Generally, the infrastructure and construction industry in Australia has a high proportion of union membership, particularly in respect of construction in major commercial centres. Union membership is not at the same high levels of concentration in many areas that involve resource construction projects. Where there have been high levels of union membership this was for many years characterised by regular industrial disputation and control by key unions.

As a result of the Cole Royal Commission into the Building and Construction Industry (held during 2001 – 2002, with the final report issued February 2003) the federal government initiated a number of legislative reforms culminating in the BCII Act and establishment of the ABCC (now the FWBC) that were aimed at addressing the following behaviours which the Royal Commission identified as widespread in the infrastructure industry:

- Disregard for or breach of the freedom of association provisions of the FW Act.
- Departure from proper OHS standards and use of OHS as an industrial tool.
- Requirement for employees of subcontractors to become union members in association with their employer obtaining a union-endorsed enterprise bargaining agreement.
- Requirement to employ union-nominated persons in critical positions on building projects.
- The making of, and receipt of, inappropriate payments.
- Unlawful strikes and threats of unlawful strikes.

- Threatening and intimidating conduct on construction sites.

The Royal Commission made four key recommendations for structural change.

- Prohibition of pattern bargaining in order to ensure that bargaining at the enterprise level occurs.
- The implementation of mechanisms so that any participant in the industry causing loss to other participants, as a result of unlawful industrial action, is held responsible for that loss.
- Implementation of a system which ensures that where disputes occur within the industry such disputes are resolved in accordance with legislated or agreed dispute resolution mechanisms rather than by the application of industrial and commercial pressure.
- The establishment of an independent body, free of the pressures on the participants in the industry, in order to ensure that building and construction participants comply with industrial, civil and criminal laws applicable to all Australians as well as industry specific laws applicable to the construction industry only.

The FWBC also has responsibility for the BCII Act and regulations. The BCII Act regulates relations and behaviour in all construction workplaces, imposes financial penalties for breaches and gives the Commissioner wide investigative powers. For example, the following behaviour by a contractor would be in contravention of the Act:

- Coercion and intimidation on building sites or in agreement making.
- Denying employees and subcontractors freedom to choose to belong, or not belong, to a union or industrial association.
- Paying workers who are on strike.

Also, under the BCII Act, a principal must not:

- Discriminate against a contractor because the contractor's employees are covered or not covered by a particular kind of industrial agreement.
- Coerce someone to enter, change, end, or prolong a building certified agreement or to engage a particular contractor.
- Coerce an employee to nominate, or an employer to contribute to a particular superannuation fund.

The FWBC also has responsibility for enforcing any provisions in the FW Act (as it applies to the industry).

Building Code 2013

A contractor's workplace relations arrangements must comply with the code and guidelines and this is a requirement to be eligible to work on projects funded directly and indirectly by the Australian Government. For example, a project agreement (which is an agreement negotiated between the head contractor and a union that applies common employment conditions to all subcontractors and employees at a site) must comply with the code requirements.

The Federal Safety Commissioner, established by the Australian Government, has as its key functions the promotion of world class OHS outcomes on Australian projects and to develop and administer the federal government OHS accreditation scheme. In addition, the Federal Safety Commissioner is tasked with identifying initiatives to improve OHS performance among Australian workplaces.

Only contractors who are accredited under the OHS accreditation scheme can enter into contracts for infrastructure work that is funded directly or indirectly by the Australian government over a specified value. Achieving accreditation is a two-stage assessment process which comprises a desktop assessment and onsite audit.

Applicants must satisfy the following criteria to obtain accreditation:

- Show evidence of an OHS management system.
- Demonstrate an ability to manage construction hazards and high risk activities.
- Keep records in relation to workplace safety.
- Provide onsite audit results.
- Perform against certain focus points such as senior management commitment to OHS and integration of safe design principles into the risk management process.

USEFUL REFERENCES

Australian Building and Construction Commissioner – www.abcc.gov.au
Cole Royal Commission hearings – www.royalcombci.gov.au/hearings/reports.asp
Federal Safety Commissioner – www.fsc.gov.au
Federal Department of Workplace Relations – www.workplace.gov.au

INSURANCE FOR INFRASTRUCTURE PROJECTS

In Australia, statute requires certain types of insurance to be taken out for infrastructure projects. Other types of insurance are taken out as agreed by the parties to a contract depending on the nature of the works and the requirements of those involved in the project.

STATUTORY INSURANCES

There are four main types of insurance relevant to infrastructure work which are required to be taken out under statute:

- (In some states) professional indemnity insurance, which must be taken out by any person providing professional services in respect of construction or infrastructure work. This would cover architects, engineers, building surveyors and project managers providing services on infrastructure projects.
- All of the state and territory based residential building Acts (excepting Northern Territory and Queensland) require a domestic builder to take out a policy covering limited defects and non-completion insurance.
- Workers compensation insurance which covers most liabilities for death or injury to employees.
- Third party motor vehicle insurance which covers third party injury liability arising out of the use of a motor vehicle.

While in most states the statutory obligation to take out defects or warranty insurance is confined to residential builders, in Victoria, legislation also requires commercial builders to take out insurance against structural defects and certain kinds of other builders (for example demolition contractors) to take out public liability insurance on specified terms.

INSURANCE BY AGREEMENT

The main types of insurances which may be required to be taken out under an infrastructure contract are:

- Public liability – covering liability for death, personal injury to any person, damage to third party property or other liability to pay compensation arising out of the works or project.
- Contract works – which covers physical damage to the works, materials, plant, equipment and temporary structures.
- Property damage – which covers damage to, or physical loss or destruction of all property belonging to the insured (not including the contract works).
- Business interruption or advanced loss of profits – which provides cover for consequential or pure economic losses including gross profits resulting from an interruption or interference with business if an insured asset is damaged. Insurance can also be obtained for advanced loss of profits (that is, where the business has not yet commenced).

- Professional indemnity – if the works include the provision of professional services such as design, there will be a requirement to take out insurance to cover loss caused by breach of professional duty. It may extend to providing cover for other specified events (such as breach of the Australian Consumer Law).
- Marine cargo – if the works include the provision of significant items from offshore there is likely to be a requirement to take out marine cargo and other goods insurance.

Often a party may procure one insurance policy covering a number of the areas outlined above. For example, first party property damage and certain kinds of consequential and indirect loss are often insured together under a policy known as an industrial special risks policy. Similarly, a contract works policy may be extended to provide coverage for certain kinds of third party liability.

There may also be project specific insurance which needs to be taken out. For example alliance contracts may now obtain professional indemnity insurance which is tailored to the risk profile of an alliance.

In addition to allocating responsibility to a party to take out and maintain particular types of insurance, a project contract will usually address the following:

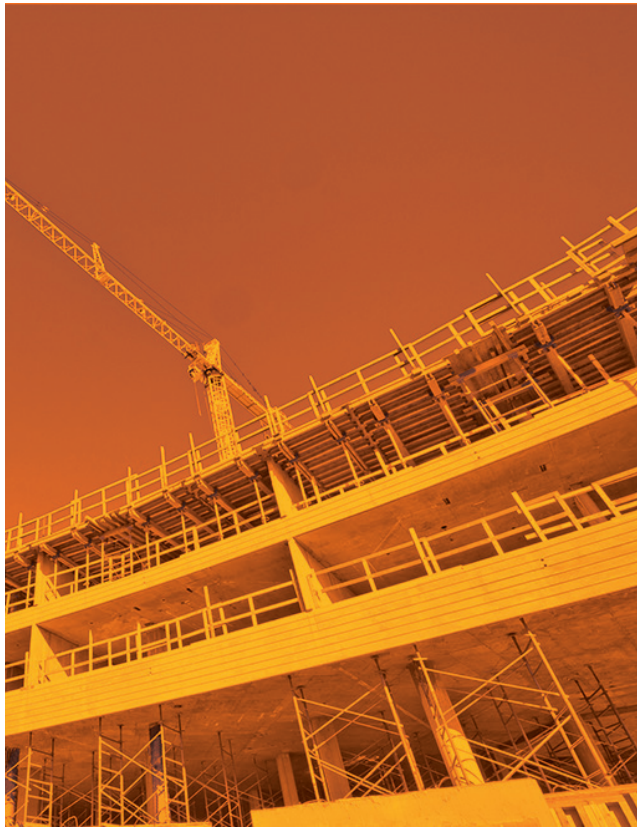
- The relationship between any indemnity or undertaking given by the contractor in relation to damage to the works and the coverage provided by any insurance taken out.
- Who bears the cost of any deductible, excess on a claim and who is responsible for paying for insurance.
- What the parties must do if there is a claim.
- The proof or evidence of insurance to be provided by the party taking it out.
- The impact of any exclusions in the insurance policies (for example a contract works policy of insurance will usually exclude faulty workmanship or design).

While the parties are generally free to agree the terms and nature of contractual insurance, the content of such insurance and the parties' obligations in relation to it are subject to a level of statutory control.

For more detail on the insurance industry, insurance contracts and insurance regulation in Australia, please see the Insurance chapter in Section One – Doing Business in Australia.

USEFUL REFERENCES

Insurance Council of Australia – www.insurancecouncil.com.au



GLOSSARY

ABCC	Australian Building and Construction Commissioner
ABIC	Australian Building Industry Contract
ACT	Australian Capital Territory
ATO	Australian Taxation Office
BCII Act	*Building and Construction Industry Improvement Act 2005* (Cth)
BOO	Build, own, operate form of contract
BOOT	Build, own, operate, transfer form of contract
CEDA	Council for the Economic Development of Australia
COT	Continuing Ownership Test
Cth	Commonwealth
CPRs	Commonwealth Procurement Rules
DBOF	Design, build, operate and finance form of contract
DBOM	Design, build, operate and maintain form of contract
EDCM	Engineer, design, construct and maintain form of contract
EPC	Engineer, procure, construct form of contract
FWA	Fair Work Australia
FW Act	*Fair Work Act 2009* (*Cth*)
FIDIC	International Federation of Consulting Engineers
GDP	Gross domestic product
GFC	Global Financial Crisis
GST	Goods and services tax
ECI	Early contractor involvement
MBA	Master Builders' Association
NES	National Employment Standards
NSW	New South Wales
NOP	Non owner participant
NT	Northern Territory
OECD	Organisation for Economic Co-operation and Development
OHS	Occupational health and safety
PPP	Public private partnership
PC	Productivity Commission
QLD	Queensland
SA	South Australia
SBT	Same business test
SOP	Security of payment
Tas	Tasmania
UNCITRAL	United Nations Commission on International Trade Law
Vic	Victoria
WA	Western Australia

Australia's legal system is subject to change. Please note, therefore, that even as this guide went to press, relevant laws may have been amended or introduced. This publication is intended as a first point of reference and should not be relied on as a substitute for professional advice. Specialist legal advice should always be sought in relation to any particular circumstances and no liability will be accepted for any losses incurred by those relying solely on this publication.

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