GOVERNMENT CONNECT

Bartier Perry LAWYERS

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INTRODUCTION

Welcome

With 2023 fast approaching, it's tempting to look back and consider all we have collectively achieved this year. But for many, 2023's challenges seem pressing, that looking back seems like an indulgence.

So in this Government Connect we focus on matters that are likely to shape success in 2023.

If there is a single theme, it is complexity. Government agencies walk a delicate line between addressing complex societal issues and adhering to, at times, equally complex legislation.

For example, we are all far more aware of native land issues than in the past. At the same time, however, agencies must also act in the interests of all. When those two imperatives conflict – as they are bound to sometimes do – the challenges can be immense.

Similarly, recent construction legislation seems to leave agency employees open to being held personally accountable if a project they have a substantive role in fails. Managing this with the obligation to commission community projects will exercise many agency minds for the foreseeable future, and we offer our thoughts on that here.

Even the impact of the Optus data breach is being felt within government agencies in the form of greater vigilance and more rigorous systems now being required.

Societal shifts are also impacting the workplace. "Quiet quitting" has become, as our younger people say, "a thing". Understanding and meeting staff expectations is a challenge for all employers, including government. Couple that with regulations that place more onus on providing a safe, inclusive workplace; pending changes to industrial legislation (as well as penalties for egregious breaches); and a slew of other pressures on employers, and it's clear that 2023 will not be a year for the faint of heart.

I hope this issue of Government Connect provides useful insights into how you might approach some of those matters.

If there are specific value adds we can provide you with, or if you would like to chat about any subjects in this issue, please reach out to myself or any of our NSW Key Team listed on the back pages.

With the festive season fast approaching please have a wonderful time celebrating in the many different ways that we do as Australians. We look forward to working with you in 2023.

Warm regards,
James Mattson

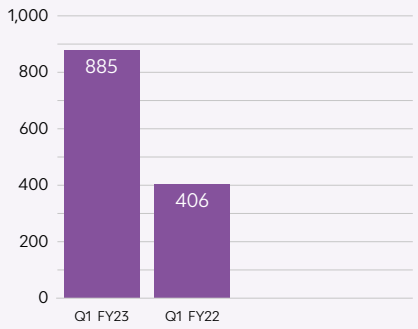
Increased insolvencies call for greater collaboration

Authors: Gavin Stuart & Gilbert Olzomer

Recent data from the Australian Securities and Investments Commission (ASIC) has proved what many of us suspected – that insolvencies are on the rise – in some industries almost threefold.

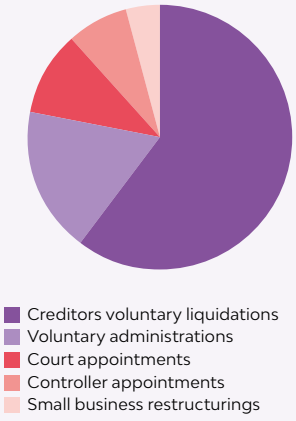
With most Covid-related business subsidies and protections a thing of the past (at time of writing), it is now clear that insolvencies are on the rise. According to ASIC, 305 NSW companies entered external administration or had a controller appointed in September 2022. This figure back in September 2021 (the height of a Sydney pandemic lockdown) was 109.

Instances of companies for the first time entering external administration or having a controller appointed in NSW



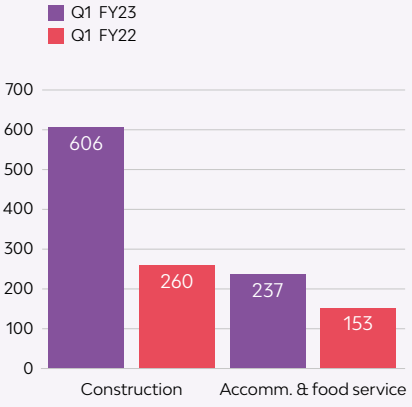
The number of companies entering external administration or having a controller appointed has more than doubled between Q1 FY22 and Q1 FY23.

Insolvencies Q1 FY23



A clear majority of recent insolvencies are through creditors' voluntary liquidations and restructuring through voluntary administrations is also an active area.

Top 2 industries that have entered into external administration or had a controller appointed



Construction has seen the greatest number of – and increase in – companies entering external administration or having a controller appointed, with hospitality a distant second.

Reasons for the increase in insolvencies include:

- the Australian Taxation Office resuming enforcement of federal taxation debts
- government Covid stimulus and protection measures (such as the 6-month period for compliance with a statutory demand) having ended
- increased costs, supply chain issues and labour shortages in the construction sector.

IMPLICATIONS FOR GOVERNMENT AGENCIES

Increased insolvencies create more pressure on government departments, given the extra workload this creates.

Often agencies and insolvency practitioners feel that they have competing interests, however to ensure best possible outcomes are achieved, there are some ways to change this.

1. **Consider funding insolvency professionals for private enquiries and litigation.** Administrators and liquidators often work unfunded which means they have limited ability to engage lawyers or incur disbursements in pursuit of claims which might ultimately result in a dividend to creditors. A director is more likely to return funds or property to an entity that has litigation funding or where a creditor is working with the insolvency practitioner to pursue the debt.

2. **Be active at creditor meetings.** Ask questions, query what investigations have occurred to date and what avenues of recovery a liquidator/ administrator is willing to explore.
3. **Where possible, provide information to the insolvency practitioner about the known affairs of the company.** Often when administrators/liquidators are appointed they are expected to identify potential claims the company might have on limited information and in circumstances where the company's books and records are incomplete or non-existent.
4. **Have discussions with other creditors.** Where creditors group together so much more can be achieved. Creditors can vote together, pressure for investigations/claims to be pursued or even form a committee of inspection.
5. **Authorise key people to consistently deal with insolvency practitioners, consider creditor proposals and vote at creditor meetings.** This will allow government departments to streamline the way insolvencies are dealt with, adapt quickly to evolving situations and develop depth in their capability across this space amongst their teams.

Liquidators and administrators have an obligation to act in the best interests of creditors. Key people within government departments can ask questions of appointed liquidators and/or administrators (together with lawyers appointed by the department) to help them make informed decisions. However, be sure to read the creditors' reports, question the insolvency practitioner's course of action and question their remuneration if it appears excessive.

OTHER CONSIDERATIONS

When faced with a debtor who enters administration, liquidation or is facing payment or cash flow difficulties, the following can also be considered:

- whether the debt will be treated as a secured debt (such as a mortgage, caveat or PPSR registration), in which case enforcing that security is the best way to recover without concerns of any clawback
- whether a personal guarantee can be relied on to pursue recovery separate to any claim that can be made on an insolvent corporate entity
- whether another party against whom action can be taken is jointly liable for the debt without the need to rely solely on any liquidation dividend or payment from a voluntary administration
- where a department believes a debtor may be insolvent, two key considerations arise:
  - firstly, any payment from the debtor to the department up to six months before the liquidation might be a preference payment and may be required to be repaid to the liquidator on demand. Defences against this include subjective knowledge of indicators of insolvency and whether a reasonable person in the department ought to have thought the debtor was insolvent at the time of payment
  - secondly, where the department believes a debtor may be facing cash flow difficulties, extending further credit may be unwise. Alternative terms such as cash on delivery, additional security or a personal guarantee can be put in place. This will provide an alternative means of recovery and also some protection where funds received are deemed a preference payment.
- if the department is concerned about payment, it should ensure any contract with the debtor is strictly complied with. Contracts often contain a provision which allows one party to terminate the contract where an "insolvency event" has been committed by the other. Any wrongful termination or failure to honour the terms of the contract could give rise to a claim for damages against the department. Advice on these provisions can be sought before taking action
- if a department wishes to continue supply arrangements with a company that is in liquidation or administration, a new agreement with the administrator or liquidator will usually be needed. Typically, the liquidator or administrator becomes the contracting counterparty, which gives rise to a number of considerations on which advice can be sought
- parties likely to default on their payment obligations may try to create a dispute or allege breaches of agreements to counter their obligations. Remember that although the department has obligations as a model litigant, non-government entities are not subject to the same standards
- while rental protections for commercial tenants under the *Retail and Other Commercial Leases (COVID-19) Regulation 2022* ended on 30 June 2022, some protections still apply to eligible tenants for breaches between 13 July 2021 and 30 June 2022. This will also affect a landlord's right to recover under any guarantee.

In general terms, moving quickly and decisively is the best way to recover in all debt recovery activities.

The Optus data breach – an earthquake whose aftermath is still being felt

Authors: Norman Donato & Isabella Krstanovski

In the wake of the Optus data breach, amendments to the *Telecommunications Regulations 2021* were introduced in October 2022. They enable telcos to disclose certain customer data to financial institutions (generally banks), the Commonwealth, and States and Territories, in order to manage the risks of malicious cyber activities.

Other changes enable telcos to provide government agencies with information to help prevent fraud. The changes will apply for 12 months and will then be reviewed by government, with no parliamentary discussion required.

However, requesting personal information carries additional privacy considerations that government entities need to be aware of.

WHAT CAN GOVERNMENT DO UNDER THE AMENDMENTS?

The amendments allow telcos to temporarily share certain government identifier information such as driver licence, Medicare and passport numbers with regulated banks and the Commonwealth and States and Territories.

The information may be requested to:

- prevent a cyber security incident, fraud, scam activity or identity theft
- respond to a cyber security incident, fraud, scam activity or identity theft
- respond to the consequences of a cyber security incident, fraud, scam activity or identity theft
- address malicious cyber activity.

The regulations include safeguards to ensure customer information is only made available for the purposes above. In addition, certain security requirements must be met, including that information or documents:

- must be stored in a manner that prevents unauthorised access, disclosure or loss
- must be destroyed when no longer required
- if not required to be destroyed, the entity must review its need to retain the information or document at least once every 12 months.

The provisions also allow the government entity requesting the information to share it with an associate (for example, a related company or contractor), but only to the extent necessary for one of the purposes listed.

In addition, a written commitment must first be obtained from the associate on the same terms that the entity is required to provide the telco.

The government has undertaken extensive consultation across Commonwealth agencies, regulators, Optus, the banking sector, telcos, and the Australian Information Commissioner in considering its approach.

This demonstrates a commitment to give financial institutions the resources to further enhance protection from financial crime, and warrants government agencies doing all they can to support them in this endeavour.

INTERPLAY WITH THE PRIVACY ACT

Banks must also comply with the *Privacy Act 1988* and the Australian Privacy Principles (APP) when handling information received from a telco.

The Office of the Australian Information Commissioner says that banks must still consider whether the information is reasonably necessary for their functions in accordance with APP 3.

In other words, they need to have clear reasons for collecting the information. In particular, if they could achieve the same outcomes using information they already hold, or they have other reasonable alternatives, it may not be reasonably necessary to request the information.

The Commissioner has also emphasised the importance of banks having robust and effective systems in place to ensure information is only used for the purposes allowed by the regulations. A government agency dealing with a bank request for information may wish to check that such systems do indeed exist.

OTHER CONSIDERATIONS

ComputerWeekly, a media organisation that reports on the IT industry, believes that organisations with strong data retention regimes are in a good position to cope with the latest regulations at a technical level, but may need to adapt some of their business practices.

In particular, it says, the demand for systems that can automate the retention and destruction of records may increase.

Likewise, the growing use of immutable storage – which prevents data from ever being changed or deleted – could complicate banks' ability to comply with the new regulations.

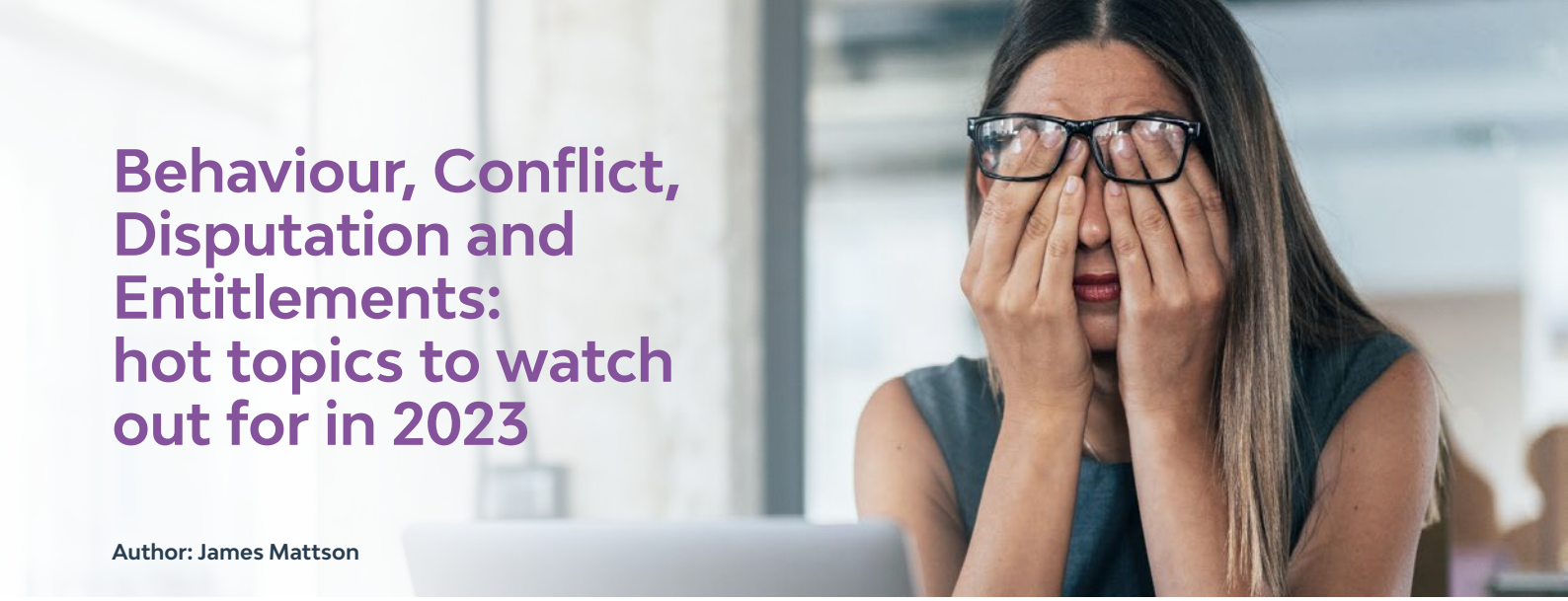
As responsible agents, government agencies should be aware of these considerations, and act accordingly – whether to ensure that they, or those with whom they share data, are able to manage it in a way that complies with the new regulations.

OTHER PROPOSED REFORMS

The Federal government is considering reforms to the Privacy Act, including increased fines for breaches, and whether entities should be permitted to retain data when the information may have only been needed to establish someone's identity. These reforms should provide further much-needed protection for consumers, particularly as data breaches are becoming more frequent.

However, in the wake of the Optus data breach, the question is whether even more needs to be done.

Behaviour, Conflict, Disputation and Entitlements: hot topics to watch out for in 2023



Author: James Mattson

As we come to the end of 2022, we already have a real sense of the issues that will confront NSW Government based employers in 2023. It will be a busy year – as usual!

'Quiet quitting' and workplace discontent and stress has certainly seen issues of misbehaviour and conflict rise in the workplace. The election of a Federal labour government, and the pending State election, has seen a keen focus on industrial disputation. The level of industrial disputation is only likely to increase into next year. Then there is the ongoing focus on employee entitlements, including for a fair wage and to expose wage theft. The scene is set for an adventurous 2023.

BEHAVIOUR AND CONFLICT

Sexual harassment will remain a key area of focus for employers, with reform in this area ongoing. At the Federal level, the *Anti-Discrimination and Human Rights Legislation Amendment (Respect at Work) Bill 2022* will make significant amendments to the *Sex Discrimination Act 1984* (Cth) to:

- make it unlawful to subject a person to a workplace that is hostile on the grounds of sex
- impose a positive duty to take reasonable and proportionate measures to eliminate, as far as possible, sex discrimination, sexual harassment or harassment on the grounds of sex.

These legislative obligations, consistent with the recommendations of the Respect@Work inquiry, will require employers to adopt a more proactive and sophisticated approach to managing insidious workplace behaviours. The *Fair Work Legislation Amendment (Secure Jobs, Better Pay) Bill 2022* will provide a regime for seeking orders to stop sexual harassment.

Psychological safety at work will also remain high on the agenda in 2023. Since 2015, there has been a 53% increase in claims for psychological injury across NSW. Important changes in NSW, focusing on improving safety, will need to be managed by organisations in 2023:

- the *Code of Practice for Managing psychosocial hazards at work*, launched in May 2021, has been heavily promoted by SafeWork NSW to ensure organisations have robust processes to identify and to manage psychosocial hazards at work
- on 1 October 2022, the *Work Health and Safety Regulations* were amended to impose an obligation to manage psychosocial risks. Psychosocial hazards can rise from the design or management of work, the work environment or workplace behaviours and interactions that may cause psychological harm.

In June 2022, Australia Post appointed a Chief Mental Health Officer. An example of providing resources – in addition to HR – to tackle difficult and perennial problems. What is your organisation doing to tackle these hazards?

Another key element to managing a workplace that is free of sexual harassment and psychosocial hazards is an effective and functional complaint management system. Too often, culture and workplace safety can suffer from inept handling of complaints. Further, in October 2023, the *Public Interest Disclosures Act 2022* (NSW) will commence operation providing a simpler disclosure regime, reduced technicalities and enhancing protections. There is continued focus on the Federal whistleblowing regime. Organisations need to grapple with different complaint regimes and ensure that management are well trained to effectively and correctly respond to complaints. Without that in place, culture will suffer and discontent may rise.

DISPUTATION

The State Industrial Relations (IR) system – which allows the easy notification and resolution of industrial disputes by compulsory conference – has provided a consistent and well known resource for government agencies in managing the impacts of industrial action. In particular, the NSW Industrial Relations Commission is empowered to make orders to cease industrial action.

The Supreme Court of NSW has recently issued penalties for "brazen and deliberate" contraventions of the Commission's dispute orders: Secretary of the *Ministry of Health v The NSW Nurses and Midwives Association* [2022] NSWSC 1178.

For those organisations in the Federal IR system, it is expected that legislative change next year may increase the ability to take strike action against employers but will introduce the ability for the Fair Work Commission to get more easily and readily involved in resolving disputes. This is vital as there is ultimately no benefit for the community and stakeholders in prolonged disputation. There needs to be a mature approach to dispute resolution.

And as we learnt from Covid, one key step an employer can take in minimising the risk of disputation is to ensure it engages in meaningful and proper consultation with the workforce and unions about workplace matters. It may ultimately save you pain and time in the long run.

ENTITLEMENTS

While the High Court decisions in *WorkPac, Personnel Contracting* and *Jamsek* provided certainty in determining worker status, this will remain an issue in 2023, with legislative reform set to establish new "objective" tests for determining status and providing rights for workers to challenge unfair contractual terms. Such reforms will re-introduce uncertainty and perhaps see a return to the days of the NSW unfair contract jurisdiction.

The gender pay gap will remain in the spotlight, with developments to prevent pay secrecy clauses and to tackle pay equity more aggressively on the agenda. An obligation to publicly report on the gender pay gap looks likely to be progressed.

Pressure on wages has seen the NSW Government increase the public sector salary cap. This is likely to continue. The way we work will remain a hot topic, with a continued focus on access to flexibility to remain a demand of workers and point of contention for organisations. Will such flexibility have a value in pay negotiations?

Other important initiatives focussed at addressing family and domestic violence will continue requiring employers to keep up to date with best practice.

Federally, the *Secure Jobs, Better Pay Bill* will enhance the ability of workers to seek flexibility and limit reasonable business grounds to refuse requests.

Wage theft will remain on the agenda, with criminalisation of wage theft likely to be part of labour government agendas.

WHAT TO DO IN 2023

A lot. It will not be dull. And with the wide breadth of psychosocial hazards, including the work environment and design, the only way to achieve compliance with all of the above is by organisations properly resourcing teams to achieve positive outcomes. 2023 will hopefully see the focus on Covid-related measures wane as we get back to the business of making productive and happy workplaces.

Compulsorily acquiring native title rights

Authors: Dennis Loether & Maja Podinic

Update on the Lawson Proceedings *Lawson v Minister for Environment and Water* [2022] NSWLEC 122

Acquiring authorities, including Councils, can acquire native title rights and interests the same way they can any other interests in land. However, the Lawson Proceedings have shed light on additional considerations with native title claims.

The proceedings take their name from Ms Dorothy Lawson, Murra Wurra Paakantji elder (dubbed 'the next Eddie Mabo' by media). While they date back to 2014, Ms Lawson's legal battle really started in 2003.

The land is in the Lake Victoria area, part of the Murray-Darling basin. In 1914, the Commonwealth and the States of New South Wales, Victoria and South Australia entered into an agreement for water storage for the benefit of South Australia.

In 1915, the agreement was ratified by the *River Murray Waters Act* (**RMW Act**). In 1922, the area was acquired by NSW under the *Public Works Act* so it could be provided to South Australia as an estate in fee simple, per the Agreement.

In first instance, Ms Lawson contends that at the time of resumption, her grandmother, Mary Alice Mitchell, had a portion of legal estate in the land. In the alternative, Ms Lawson alleges that at the time of resumption, she (Ms Lawson) was a member of the Native Title Group, the Maraura People, who held native title rights and an interest in the land.

Mrs Lawson's claim for compensation has proved to be anything but straightforward, as we will now show.

THE FIRST HURDLE

The first hurdle, considered in the NSW Land and Environment Court, was that the statutory time limit for submitting a claim elapsed about 100 years ago. However, the judge used the discretion afforded under the *Public Works Act* to grant Ms Lawson an extension (now repealed). This allowed Mrs Lawson to progress her claim.

THE SECOND HURDLE

The next step was considering whether entitlement to claim compensation under the *Public Works Act* could be transferred to another person.

In 2017, the NSW Land and Environment Court ruled that the entitlement could be transferred – either to the Public Trustee or to the executor or administrator of the estate of the deceased person. This meant that Ms Lawson passed the second hurdle. Proceedings were to carry on.

THE THIRD AND FOURTH HURDLE

The nature of the 1914 Agreement, and its subsequent ratification, led to a further question of law: Was the land in question vested in South Australia for an estate in fee simple under Section 18 of the *River Murray Waters Act 1915* (NSW)?

The NSW Supreme Court held that the land was, indeed, vested in South Australia and therefore dismissed the proceedings.

Ms Lawson appealed this decision. In 2021, the NSW Court of Appeal held that the land was not vested in South Australia for an estate in fee simple. In its ruling, the Court held – contrary to the Supreme Court's judgement – that Section 18 of the *RMW Act* (extracted below) could not be read literally:

> *"The lands mentioned in Schedule B to the agreement are hereby vested in South Australia for an estate of fee-simple, and may, subject to the conditions expressed in the agreement, be granted or transferred to any person appointed in that behalf by the Government of that said State"*

The literal interpretation would not be consistent with statutory purpose, said one of the Appeal Court judges. The *RMW Act* is meant to be read concurrently with the *Public Works Act*, he said. On that basis, the pre-existing rights were not extinguished by the *RMW Act*, but by the resumption which was granted by the *Public Works Act*.

Another of the Appeal Court judges agreed with the appeal, but for a different reason. The words "hereby vested" should not be interpreted as the time of the operation, he said, but rather the effect of that section.

Of all the hurdles Ms Lawson had to overcome, this was the most significant. It goes to the crux of all compulsory acquisition claims – for there to be a claim for compensation, a pre existing right must have been extinguished. If it was found that the *RMW Act* granted South Australia an estate in fee simple, then any pre-existing rights were not extinguished by the resumption in 1922.

MOST RECENTLY

In October 2022, the NSW Land and Environment Court heard a claim from the Barkandji Native Title Group Aboriginal Corporation (**the Corporation**) that it should be joined as a party to the proceedings.

This was opposed by Ms Lawson. The Corporation is a prescribed body corporate which holds on trust the native title rights of those whose title rights were recognised by the Federal Court in 2015 and 2017.

Referencing *Ross v Lane Cove Council* [2014] NSWCA 50 and *Victoria v Sutton* [1998] HCA 56, Moore J said a joinder was appropriate, as the rights of the Corporation "may" be impacted.

At this stage, it is not certain the rights of the Corporation will be affected. This is because a potential native title interest only arises if Ms Lawson is successful in the current proceedings.

What does this all mean for acquiring authorities?

The key takeaways from the Lawson Proceedings for acquiring authorities are:

1. Regard must always be given to the acquiring legislation, and any discretionary powers within, which allows the Court to vary ordinary statutory provisions (i.e. time limits). This may allow compulsory acquisition claims to apply in retrospect.
2. A legal right to claim compensation can be passed on through the deceased's estate even if the deceased took no action to instigate proceedings.
3. The interpretation and purpose behind acquiring legislation must be considered. The rights which are (or will be) extinguished are considered in conjunction with the legislation which gives acquiring authorities the power to resume land. Although native title is governed by the *Native Title Act 1993* (Cth), it may also be owed under NSW legislation.
4. Joinder applications may be granted even though they are dependent on a specific outcome of a claim.

Update on *Olde English Tiles v Transport for New South Wales* [2022] NSWCA 108

Many readers will be aware of the decision of the five-Judge bench of the Court of Appeal in *Olde English Tiles v Transport for New South Wales* [2022] NSWCA 108.

This landmark case held that:

1. "Interest in land" must be in privilege over or in connection with land. While the definition can encompass a wide range of interests, there is no obligation for compensation of interests based on personal relationships.
2. Most importantly (and the reason for its 'landmark' title) is the Court's decision that a compensable interest must begin with the foundation of a market value claim. Once this has been proven, claimants may then access the right to claims for compensation for losses attributable to disturbance. This has serious implications for claimants with bare licences, or permission to occupy the land, as they have no foundation or interest and cannot, therefore, claim disturbance. Claimants with leasehold interests must prove they were paying market rent.
3. It is inappropriate to overrule the existing authorities of *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* [2017] NSWCA 73 and *Hornsby Council v Roads and Traffic Authority of New South Wales* (1997) 41 NSWLR 151, as these cases instigated substantial legislative amendments to the *Just Terms Act* in 2016.

Whether the intention of the *Just Terms Act* is to close the door on disturbance claims for those without a compensable interest is a matter of much debate. Arguably, without any Court authority to the contrary, claims must progress on the current legislative basis – that is, no market value means no compensable interest.

The Applicant has filed a special leave application to the High Court of Australia. Acquiring authorities are awaiting the outcome with bated breath, as it will have significant ramifications for both acquiring authorities and interest holders.

As soon as we have news on that application, we will provide a further update.

Design and Building Practitioners Act in practice

Author: David Creais

A fundamental shift in who carries risk.

The *Design and Building Practitioners Act* ("**the Act**") has been described by the Supreme Court of NSW as "labyrinthine" and "fiendishly difficult" to interpret. Recent events show that these may be understatements.

BACKGROUND

The Act is one result of the Shergold Weir Report, commissioned in mid-2017 following the Lacrosse and Grenfell Tower fires. The report identified serious and widespread compliance failures in the NSW construction industry, including the implementation of the National Construction Code and a lack of clarity around accountability.

Following the report, the NSW Government announced its intention to implement four major reforms across the construction industry. The duty of care provisions of the *Design and Building Practitioners Act* are one of those reforms.

THE PROVISIONS

Section 37 of the Act establishes a statutory duty of care on those who carry out construction work to not cause loss to the end user by defects arising from that work.

The duty of care is owed whether or not the construction work was carried out under a contract or other arrangement entered into with the owner or another person. It cannot be delegated to another person, nor can it be excluded by contract.

The provisions commenced in June 2020 and are given retrospective operation for the preceding 10 years.

THE ISSUES

The devil, as they say, is in the detail. Two questions in particular have proved irksome.

1. What is the "construction work" to which the duty applies?
2. Who is "a person who carries out construction work"?

"Construction work" is defined as any of the following:

(a) building work

(b) the preparation of regulated designs and other designs for building work

(c) the manufacture or supply of a building product used for building work

(d) supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work referred to in paragraph (a), (b) or (c).

Although not defined "building work" is said in Section 36(1) to include residential building work within the meaning of the *Home Building Act 1989*.

A "building" is defined as having the same meaning as in the *Environmental Planning and Assessment Act 1979*. That is a wide and somewhat circular meaning, being: "[P]art of a building, and also includes any structure or part of a structure…"

"Person" is not defined. Nor is any of "supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work".

WHAT WOULD A REASONABLE PERSON THINK?

Given the background to the Act (which is a response to numerous defective residential apartment buildings) and that its other provisions are stipulated to relate only to residential apartment buildings, one might reasonably assume that the duty of care applies only to residential building work.

One might also reasonably assume that where the contracting party is a corporation, the "person who carries out construction work" is that corporation, rather than any people it employs. For more on this, see the rules for interpretation of "person" in the *Interpretation Act 1987*.

IN PRACTICE

Recent case law suggests that using the "what-a-reasonable-person-may-think" rule in relation to the Act is a pathway to disappointment.

In *Goodwin Street Developments Pty Ltd atf Jesmond Unit Trust v DSD Builders Pty Ltd (in liq)*, the Supreme Court held that "building work", so far as it relates to the duty of care, is not confined to residential building work.

Rather, it covers construction of any building that comes within the meaning given to that term in the *Environmental Planning and Assessment Act 1979*.

The Court drew on the amendments which gave effect to the current definitions of "building" and "building work". It said:

> *"Amendment No. 1 provides that the duty of care applies to all buildings and includes a definition of "building" for the purpose of the duty of care and that "building" has the broad meaning of "building" in the Environmental Planning and Assessment Act. Amendment No. 2 makes clear that the duty of care extends to building work, including residential building work within the meaning of the Home Building Act. This amendment will ensure that the duty of care amendments will have broad coverage, which is the intent."*

So the duty of care does, in fact, include construction of public, commercial and industrial buildings, as well as residential buildings.

As for who has that duty of care, recent rulings from the Supreme Court have also undone notions of what a "reasonable person" may think.

The Act places the duty of care on anyone engaged in "supervising, coordinating, project managing or otherwise having substantive control over the carrying out of any work".

Those words "substantive control" are where things get interesting. While supervising, coordinating and project managing may be fairly obvious, what exactly constitutes substantive control?

An answer was provided in *The Owners – Strata Plan No 84674 v Pafburn Pty Ltd*, where an owners corporation sued developer Madarina Pty Ltd for defective works.

The question that arose was whether it was necessary to show the developer exercised "substantive control over the carrying out of" the building work, or whether it was sufficient to show only that they *had the ability* to exercise such control.

The Court held that having the ability to control how the work was carried out was sufficient to constitute "substantive control".

(Whether a person is in a position to control how work is carried out would be a question of fact in each case.)

That raises important issues for government agencies. Consider a NSW Government agency employee who is superintendent of a building project, and their duty to act fairly (and not in the interests of either the principal or the contractor) is specifically excluded in the contract.

Is the agency able to control how the work is carried out in this situation? It seems the answer is likely to be yes.

Further relevant cases include *Goodwin Street Developments Pty Ltd*, where the husband of the sole director of the company that had contracted to construct the work was held to be personally liable under the Act.

That was because he not only engaged in project managing, but he also supervised construction.

He was neither an officer nor an employee of the builder, and nor does it appear that it was argued he was the agent of the builder. So one might think that his actions (and omissions) should be imputed to the builder, thus relieving him of liability.

Not so, however. *Boulus Constructions Pty Ltd v Warrumbungle Shire Council (No 2)*, tells a different story.

Here, the plaintiff Council sued a builder who had constructed a retirement village on its behalf.

After the new Act came into force, the Council applied to amend its summons to include a claim for breach of the duty of care against the builder's managing director and its project site supervisor. It alleged both were both able to, and in fact did, exercise control over the carrying out of the building work.

Counsel for the two employees pointed to the potentially wide-ranging consequences of construing "persons" in Section 37 to cover a director or employee of a builder:

> *"Every person on a construction site has substantive control or supervision over some building work performed at that site [so]... every such person could potentially come within the ambit of a 'person who carries out construction work', and be the subject of an automatic statutory duty of care ...Such a broad interpretation could make hundreds, or on a very large job even thousands, of people personally liable..."*

Counsel submitted that "person" should be construed as "a person who carries out construction work in their own capacity" and should not include a person who acts as agent for another, such as an officer of a company or an employee.

However, the Court held that "person" could not be interpreted to mean a person acting "in their own capacity". Parliament has used the expression "person" in Section 37(1). That must mean someone who is not necessarily a building practitioner (as defined in the Act) and not necessarily a person acting in their capacity as a building practitioner; nor necessarily acting "in their own capacity".

So, any individual who supervises, coordinates, project manages or is able to control how building work is carried out owes the duty of care under the Act and is potentially liable, even if they are an employee, including of a NSW Government agency.

THE FUTURE

The Act represents a fundamental change in the principles and scope of liability for defective construction work and appears to lend itself to wide-ranging unintended consequences.

It remains to be seen whether the legislature will adjust the provisions to remedy this.

Proposed new legislation is currently in the public consultation stage. Its aim is to further overhaul the legislative framework for the construction industry, including Part 4 of the Act, which provides for the duty of care.

Until this legislation is finalised, we anticipate a large shift in the appetite for risk of participants in the NSW construction industry, including government agencies and their employees and consultants.

YOUR KEY NSW GOVERNMENT TEAM

Our experienced team of lawyers are dedicated to providing our NSW Government agency clients not only with highest-order legal advice, but with outstanding legal service.

We are delighted to offer our services across the following NSW Government sub panels.

SUB PANEL 1
CONSTRUCTION

- Construction
- Major infrastructure projects
- PPPs and associated transactions
- Construction related dispute resolution and arbitration

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SUB PANEL 2
COMMERCIAL

- Commercial and contractual matters
- Financial Services law
- Intellectual Property
- Information Technology
- Competition law
- Taxation law

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SUB PANEL 3
PROPERTY, PLANNING, ENVIRONMENTAL

- Complex property advice, transactions and accreditation
- Routine/standard property advice and transactions
- Planning, environmental, heritage, and natural resources law
- Statutory land acquisition
- Crown Land and local government

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SUB PANEL 4
EMPLOYMENT, WORK, HEALTH AND SAFETY

- Employment and industrial relations
- Visiting practitioner contract and appointment disputes and appeals
- NSW Police specific matters
- Work health and safety
- Discrimination

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SUB PANEL 5
ADMINISTRATIVE LAW, GOVERNMENT AND REGULATORY

- Administrative law, statutory interpretation and governance advice
- Statutory Applications
- Enforcement, regulation and prosecution

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Treasury	Darren Gardner
Planning, Industry & Environment	Dennis Loether
Customer Service	Norman Donato
Health	James Mattson
Education	David Creais
Transport	Darren Gardner
Stronger Communities	James Mattson
Regional NSW	Dennis Loether

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VALUE ADDED SERVICES

Bartier Perry is committed to a partnership approach with NSW Government. We believe the way to provide best value add services is to work with Agencies to identify opportunities and initiatives that best meet your needs. We invite you to reach out to relationship partner James Mattson or any of our cluster partner contacts to discuss these offerings or to discuss areas where we can add value. We will also ensure we contact you with suggestions (that are outside of the below offerings) as they arise.

Our value add offerings include:

ADVICE HOT-DESK

NSW Government agencies can, without charge, contact us to obtain brief advice. Our clients tell us that they value this service which often allows them to address potential issues early.

ATTENDING TEAM MEETINGS

For example, we would welcome attending HR team meetings to not only learn about what is occurring but to be available to answer questions for 15-30 minutes to provide guidance. Similar to a 'hot-desk' but structured to be face-to-face and engaging.

MENTORING PROGRAM

Agency staff have told us they value the informal mentoring program we have in place. Lawyers, often employed in Local Health Districts or NSW Government employed solicitors, may be working without a supervising lawyer and require hours of supervision to obtain their unrestricted practising certificate. We assist by meeting weekly or fortnightly to review their caseload and make suggestions on strategies and approaches. We align our mentoring approach to the Law Society of NSW's structured mentoring program.

CLE, TRAINING AND EDUCATION

We provide our clients with tailored seminars, workshops and executive briefings for senior management on current legislative changes and regulatory issues. Seminars are captured via webcast for regional clients and those unable to attend in person. Videos are then uploaded to our website.

E-UPDATES ON LEGAL REFORM

We distribute electronic articles on a weekly basis which detail legislative and case law changes and industry developments as they occur, and often before they occur. We encourage our clients to re-publish our articles across their internal communication platforms, as appropriate.

PROVISION OF PRECEDENTS, LIBRARY AND RESEARCH FACILITIES

We can provide precedent documents and templates from our library on request. We have an extensive library and subscribe to the three major online resource providers (Thomson Reuters, CCH and LexisNexis). NSW Government agencies may have access to our physical library resources at any time and can conduct research using our online services together with 20 hours per year of complimentary paralegal support.

SECONDMENTS AND REVERSE SECONDMENTS

We understand the provision of secondees is particularly valued and we welcome the opportunity to continue to provide legal secondments to NSW Government Agencies. We would also welcome the opportunity for a reverse secondment for NSW Government Agency staff who may benefit from spending a week (or similar) working in our office alongside one of our senior lawyers.

All articles, upcoming events and past videos can be found under the Insights tab at – www.bartier.com.au

ABOUT BARTIER PERRY

Bartier Perry is, and has always been, a NSW based law firm committed to serving the needs of our clients in NSW.

Our practice has corporate clients from a wide range of industry sectors, and appointments to all levels of government including statutory bodies. With over 100 lawyers, we offer personalised legal services delivered within the following divisional practice areas:

- Corporate & Commercial and Financial Services
- Dispute Resolution and Advisory
- Property, Planning and Construction
- Insurance Litigation
- Estate Planning & Litigation, Taxation and Business Succession
- Workplace Law & Culture

YOUR THOUGHTS AND FEEDBACK

Thank you for taking the time to read our Government Connect publication.
We hope you found it informative.

If you have any comments on this issue, or suggestions for our next issue, we'd love to hear from you.

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