GOVERNMENT CONNECT

Property, Planning & Construction

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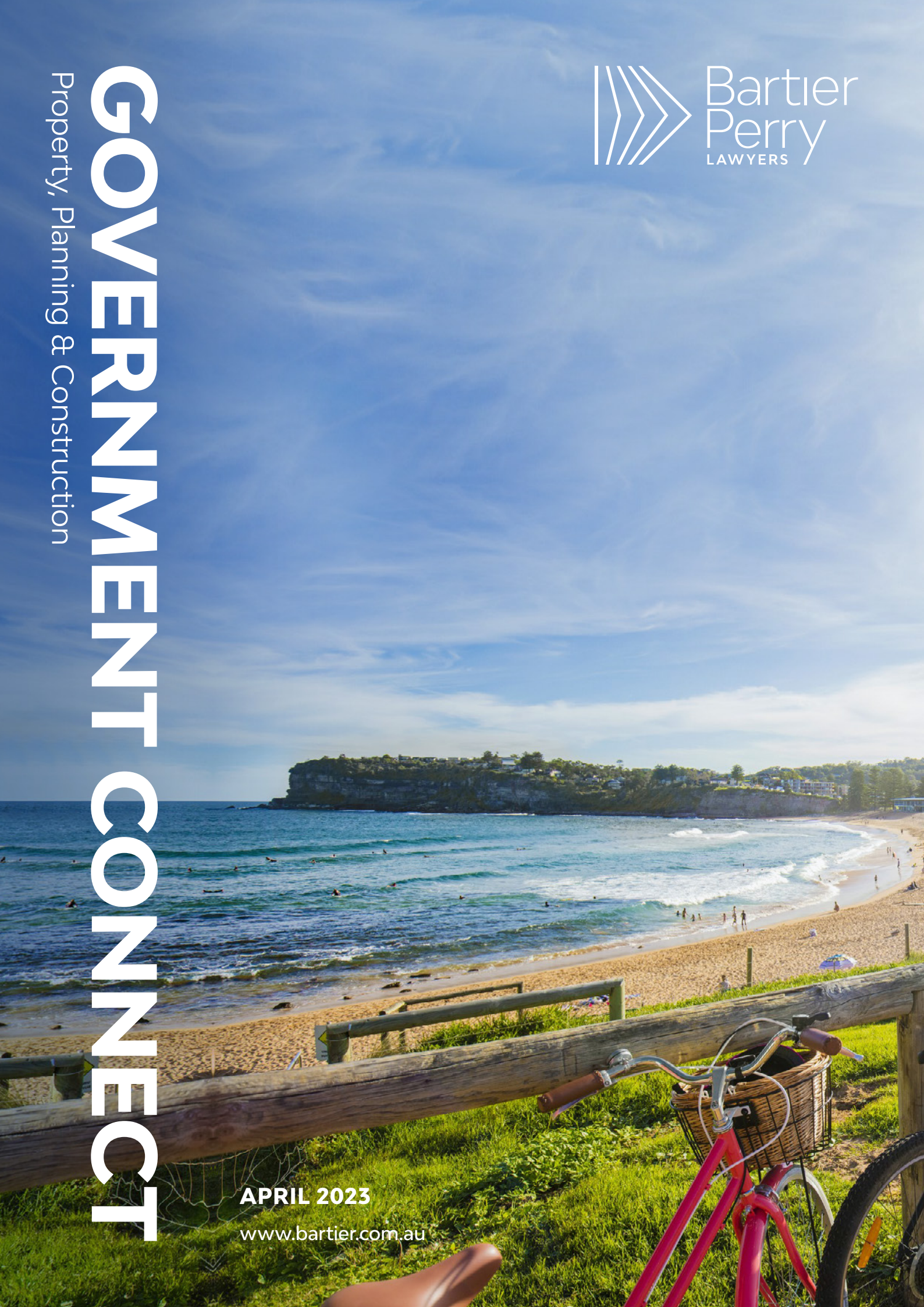

APRIL 2023

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TABLE OF CONTENTS

INTRODUCTION

Welcome to our April 2023 Government Connect.

This issue focuses on the NSW property sector and the legal issues – both in terms of challenges and opportunities.

With the State election behind us, agencies can look forward to getting on with the business of running our State.

This issue of Government Connect includes an update on the recent High Court special leave application on compulsory acquisitions, tips for negotiating contractual indemnities as well as the enforceability of covenants by unnamed parties to a deed. We also look at how principals can effectively manage defects & delays in projects.

Keeping up to date with latest case law and judicial decisions is part of what we do. We then look carefully at all the material and choose what we believe our Agency clients most need to know. As always, if there are topics you would like to see us cover, please let me know.

In terms of our team, we have added 4 new partners. Of these partners, 2 join our NSW Government Focus team for property, environment & planning, and construction. Andrew Grima and Nicholas Kallipolitis are all not only exceptional lawyers, they are also service driven and experienced government advisors. We look forward to introducing them to you soon. Feel free to reach out to them directly or don't hesitate to contact me and I can arrange an introduction.

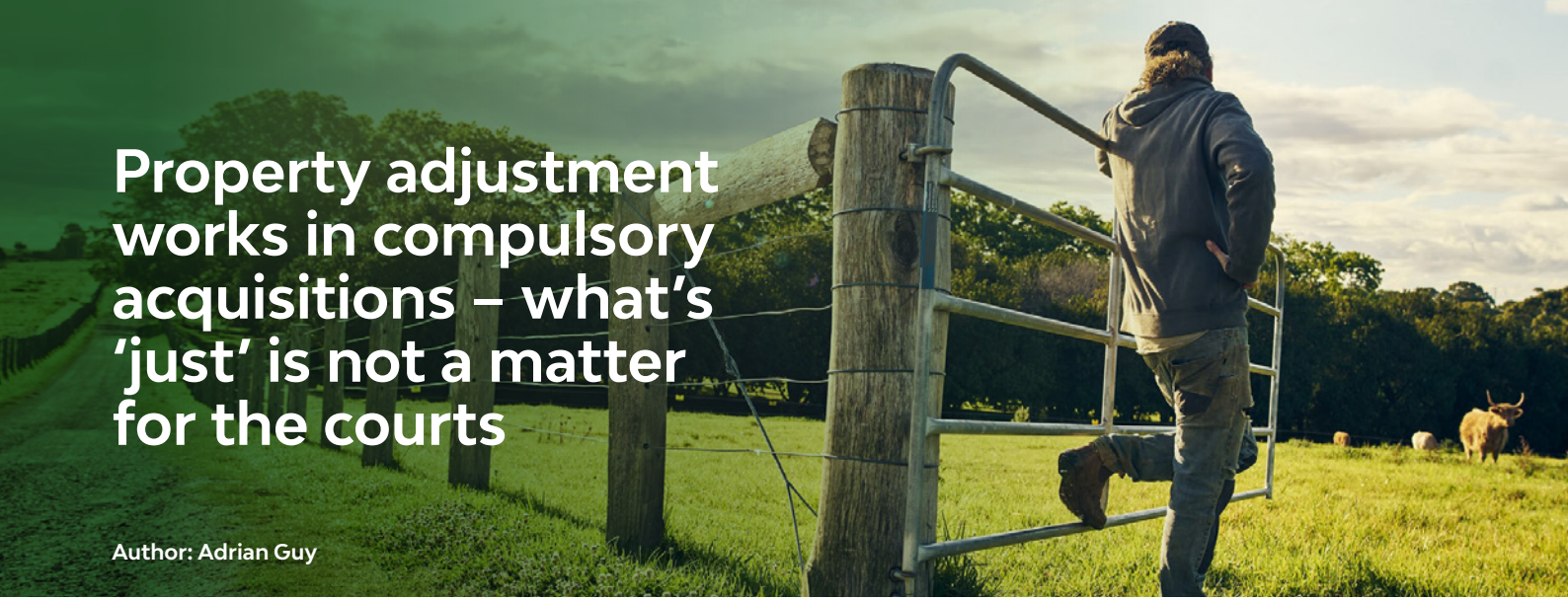
Lastly, it was great to catch up with many of you at our recent breakfast briefing on leasing, planning and construction - the issues you face in Government Property. For anyone who couldn't make it but would like any of the sessions delivered to their team, please get in touch.

Warm regards,
Dennis Loether

Dennis Loether

Practice Leader, Property Planning & Construction

NSW Government Cluster Partner – Planning, Industry & Environment



Property adjustment works in compulsory acquisitions – what's 'just' is not a matter for the courts

Author: Adrian Guy

An owner whose interest in land affected by an acquisition notice is entitled to compensation paid by the acquiring authority, pursuant to section 37 of the *Land Acquisition (Just Terms Compensation) Act 1991 (NSW) (Just Terms Act).* The amount of compensation to be paid, having regard to relevant matters for consideration, must 'justly compensate' that owner for the acquisition: see sections 54 and 55 of the Just Terms Act.

However, that compensation need not be monetary in all circumstances. It may also be provided, either wholly or partly, in the form of the carrying out of works on the land pursuant to section 64 of the Just Terms Act, otherwise known as 'property adjustment works'.

Such compensation is common in compulsory acquisitions, especially when only part of a parcel of land is acquired. In such instances, property adjustments often include relocation and reconstruction of driveways and boundary fences, but may include more extensive works as well.

PROVIDING PROPERTY ADJUSTMENT WORKS - KEY ELEMENTS

Breaking down section 64 of the Just Terms Act, the following three elements are apparent:

1. The compensation concerned is that which the owner of the interest is entitled to. Accordingly, pursuant to section 54 of the Just Terms Act, the compensation must 'justly compensate' the owner of the interest for the acquisition.
2. Whole or part of the entitlement may instead be provided in the form of property adjustment works.
3. The owner of the interest and acquiring authority must agree that either whole or part of the compensation being provided as property adjustment works.

CASE LAW REGARDING PROPERTY ADJUSTMENT WORKS

The Land and Environment Court (the Court) has jurisdiction to determine disputes concerning compensation for compulsory acquisitions. Its power is limited to determining the nature of the estate or interest and the amount of compensation to which the owner of the interest is entitled, pursuant to section 25(1) of the *Land and Environment Court Act 1979 (NSW)* (LEC Act). It does not have jurisdiction to rule on the nature or extent of property adjustment works.

This was made clear in *Van Tonder v Hodgkinson* [2012] NSWLEC 86 at [9] per Biscoe J, where the Court stated:

> *In substance, at least some of the orders sought appear to be for compensation for compulsory acquisition in the form of land and works. In my opinion, even if this Court has jurisdiction, it has no power to make such orders. The Court's power under the Just Terms Act is limited to determining compensation because of the compulsory acquisition of land "in accordance with" the Just Terms Act, Division 2 of Part 12 of the Roads Act 1993 or any other Act: ss 19(e) and 24 of the Land and Environment Court Act 1979. Entitlement to compensation in the form of land or works only arises if the person and the authority of the State concerned agree: s 64 Just Terms Act. In the present case there is no such agreement.*

However, the Court may make orders for property adjustments in accordance with an agreement of the parties (being the owner of the interest and the acquiring authority) as to terms of a decision in the proceedings, pursuant to section 34(3) of the LEC Act. In that instance, the Commissioner must dispose of the proceedings in accordance with the agreement and set out the reasons for the decision in writing.

In *Billbergia Group Pty Ltd v Transport for New South Wales* [2020] NSWLEC 1652, the parties agreed on compensation to be provided in the form of money paid and in the form of an easement (being a form of land, as defined in section 4(1) of the Just Terms Act). Peatman AC proceeded to make orders in accordance with that agreement and provided the following reasons in the written decision at [26]-[28]:

> *[26] In this case, the parties have agreed that the compensation will be partly by money paid, and partly by way of an easement for services over the Land, and entering into a deed to facilitate potential relocation of the easement if required…In light of the s 34 agreement between the parties in this case, compensation determined in accordance with the requirements of Part 3 Division 4 of the Just Terms Act may be provided partly by the payment of money and partly by the giving of an interest in land.*
>
> *[27] As set out above, I am satisfied that the parties' decision is one that the Court could have made in the proper exercise of its functions, as required by s 34(3) of the LEC Act.*
>
> *[28] As the parties' decision is a decision that the Court could have made in the proper exercise of its functions, I am required under s 34(3) of the LEC Act to dispose of the proceedings in accordance with the parties' decision.*

Case law to date is clear that the operation of section 64 of the Just Terms Act is dependent upon agreement being reached between the owner of the interest and the acquiring authority: see *Reginald Arthur Gosper v Hornsby Shire Council* [1993] NSWLEC 84 (Bignold J); *Cook, Saad, Raguz & Ors v Roads and Traffic Authority of New South Wales* [2007] NSWLEC 136, [77] (Jagot J); *Van Tonder v Hodgkinson* [2012] NSWLEC 86, [9] (Bisco J).

Although the above decision did not involve compensation in the form of property adjustment works, the same approach is taken by the Court when such agreements are reached.

In the absence of agreement between the parties, the Court cannot make orders for compensation in the form of property adjustment works, it may only make a determination on compensation to be paid. However, compensation that may have otherwise been provided in the form of property adjustment works can be awarded as disturbance, pursuant to sections 55(f) and 59(f) of the Just Terms Act.

KEY ELEMENTS REVISITED

Looking back to the three key elements for providing property adjustment works pursuant to section 64 of the Just Terms Act, it is evident that the second and third elements are clear-cut and supported by the Court.

However, the first element begs the question: how do acquiring authorities determine whether compensation in the form of property adjustment works will 'justly compensate' the owner of the interest in land?

Where compensation is to be provided partly in the form of property adjustment works, the remaining compensation amount may be discounted by the exact cost of the property adjustment works. In that respect, calculating losses for disturbance pursuant to section 59(f) of the Just Terms Act may be useful in determining an arrangement that may 'justly compensate' the owner of the interest.

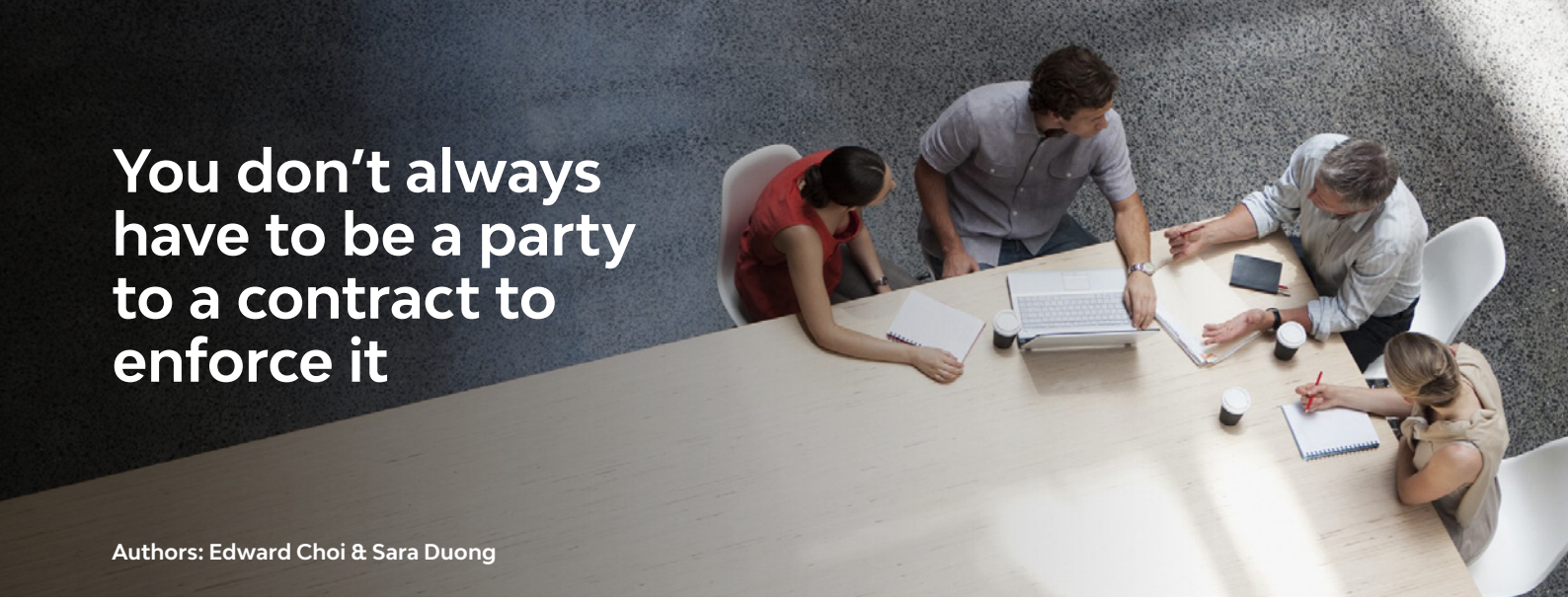
Ultimately, it is for the owner of an interest in land and the acquiring authority to determine what constitutes a 'just' arrangement. The property adjustment works may represent a 'like-for-like' arrangement, for example, a driveway that directly replaces one on land that has been compulsorily acquired. The property adjustment works may also represent a 'this-for-that' arrangement, where works leave the owner of the interest either better or worse off than before.

What is fundamental is that the parties reach agreement.

A common issue in negotiating such agreements is the possibility of 'double-dipping', that is, the provision of property adjustment works and monetary compensation, without any discount being applied to the latter by virtue of the former. This can be avoided by distilling the agreement into a Deed, where the scope and timing of property adjustment works are sufficiently detailed, the works themselves are accurately quantified and the remaining monetary compensation is subsequently discounted.

Bartier Perry can assist with the negotiation, drafting and review of such agreements.

You don't always have to be a party to a contract to enforce it



Authors: Edward Choi & Sara Duong

Privity of contract is the principle that only parties to a contract can enforce or be bound by the terms of that contract.

However, when multiple State Government Agencies collaborate on a particular property transaction, it may be possible to draft the contract in such a way that those agencies, as non-parties to the contract, are also entitled to enforce it.

In this article, we look at the privity principle and exceptions to its rule. We discuss how specifically drafted contract inclusions can provide agencies with enforcement recourse even if they are not a party in the contract.

IS THE PRIVITY PRINCIPLE WITHOUT EXCEPTIONS?

The short answer is – no. In *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107 the High Court indicated that privity of contract may not apply where:

- an offeror who is a party to a contract unequivocally makes a promise in favour of a third party in return for consideration by the offeree
- the third party would suffer loss or damage if the promise is not observed.

While this case related specifically to an insurance contract, it made it clear that exceptions to the principle of privity of contract are possible.

EXCEPTIONS IN PROPERTY TRANSACTIONS

In fact, the *Conveyancing Act 1919 (NSW)* (Act) also provides a statutory exception to the principle of privity of contract. Section 36C of the Act states:

(1) A person may take an immediate or other interest in land or other property, or the benefit of any condition, right of entry, covenant, or agreement over or respecting land or other property, although the person may not be named as a party to the assurance or other instrument.

(2) Such person may sue, and shall be entitled to all rights and remedies in respect thereof as if he or she had been named as a party to the assurance or other instrument.

What does this mean in practice? The exception may apply when:

- a lease under which one government agency is the lessee but another government agency occupies the premises
- a lease under which agencies that are non-parties co-occupy or share the premises with an agency being the lessee
- a licence agreement under which agencies that are non-parties enter the premises to carry out works on behalf of an agency being the licensee
- a positive covenant that requires a non-government covenantor to comply with the terms of the covenant for the benefit of an agency that is not the covenantee.

However, this statutory exception is not without limitations.

In *Perpetual Trustee Co Ltd v Willers (1955) 72 WN (NSW) 244* the Supreme Court held that section 36C of the Act cannot benefit an entity that did not exist at the date of an agreement or instrument.

In other words, a non-party agency that did not exist at the date of an agreement, or that did exist at the date of the agreement but later changed its name, cannot rely on section 36C of the Act.

In addition, the Supreme Court's decision in *Australian Mortgage and Properties Pty Ltd v Baclon Pty Ltd* [2001] NSWSC 774 indicates that a mere reference to a class or category of non-party is not sufficient for section 36C of the Act to apply.

CONTRACTUAL RECOURSE

Given the limits of statutory recourse to bypass privity of contract, a deed poll provision may sometimes be included in an agreement to achieve the same end. A deed poll expresses one party's unilateral intention to be bound by the agreement against a defined category of people or entities who are not parties to the agreement.

The deed poll provision can be agreed with a covenantor and included in an agreement to:

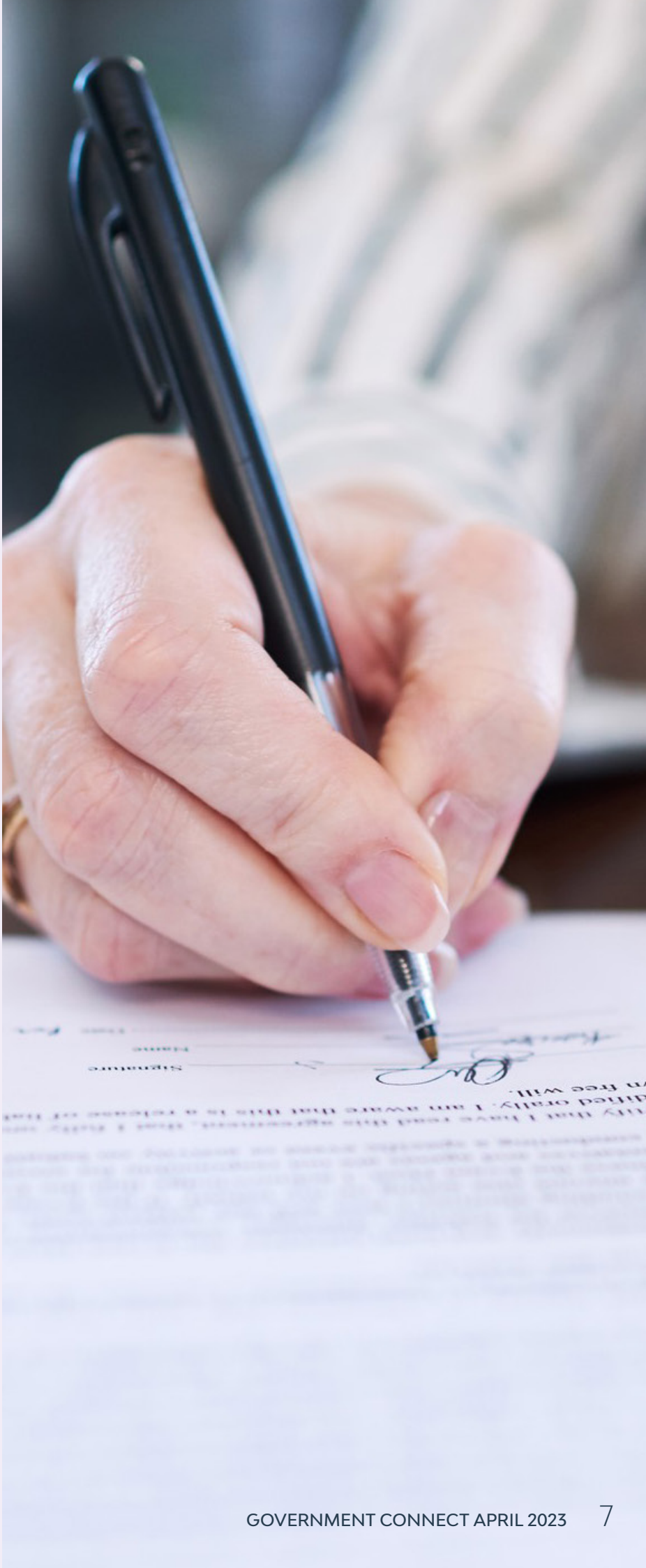
- empower a non-party agency to enforce the covenant
- empower the entity in whose favour the covenant is made (the covenantee) to require the covenantor to observe the promise, and to do so on behalf of a non-party agency.

As long as the provision complies with the standard requirements of a formal deed, it provides contractual (as opposed to statutory) rights on the covenantee and the non-party to enforce the covenant.

IN PRACTICE

If an agency entering a contract wishes to provide statutory recourse to a specific third party under section 36C of the Act, it should at the very least ensure the third party is 'specifically identifiable' within the terms of the contract.

However, given the limitations of this approach, a carefully drafted deed poll provision will often be preferable if there is room for negotiation with the covenantor.



Contractual indemnities - handle with care!

Author: Irene Horan

Indemnity clauses are often added to contracts in order to transfer risk from one party to the other in the case of a specific event.

In other words, Party B agrees to keep Party A 'unharmed' from loss or damage.

All types of contracts can include indemnity clauses including land, construction, manufacturing, business, leases, sale of goods and service agreements.

In this article we explore the reasons why such indemnity clauses are used, the different types of indemnities, how they differ from warranty clauses and also things to consider when drafting the clauses.

WHY EMPLOY THEM?

When one party fails to comply with its obligations under a contract, the other party may be entitled to damages that would leave them in the same position they would have been in had the contract been performed as originally intended by the parties.

Under common law, however, the award of damages can be reduced (partly or in whole) for reasons such as causation, remoteness or mitigation.

An indemnity clause can allow parties to bypass the above limitations of the common law and allocate risk in cases where a breach of contract has occurred.

Such clauses therefore alter the common law or statutory rights of the parties.

TYPES OF INDEMNITY CLAUSES

There are four types of indemnity clauses:

1. bare – one party indemnifies the other against all liabilities or losses associated with given events or circumstances (without any limitations)
2. proportionate – one party indemnifies the other against losses except those which occur due to the second party's own acts and/or omissions
3. reverse – one party indemnifies the other against losses resulting from the second party's own acts and/or omissions
4. third party – one party indemnifies the other in relation to liabilities or claims by a third party.

NOT A WARRANTY

A warranty is a statement of fact, or assurance, made by one party (the "warrantor") to the other party (the "warrantee") under a contract.

An indemnity is not a statement of fact, but a promise by one party (the "indemnifier") to the other party (the "indemnified") to reimburse the second in respect of liability or loss suffered by the second party.

Generally, a warranty guards against the *unknown* while an indemnity apportions risk in respect of a *known* liability.

NOT TO BE TAKEN LIGHTLY

Indemnity clauses are onerous and usually drafted in broad terms. They should not be overlooked and treated as 'boilerplate provisions'.

They generally cover circumstances and actions of third parties that are outside the breach circumstances actionable under common law. In practice, they typically favour those with the most bargaining power and influence in a transaction.

For those reasons, the party providing the indemnity should carefully consider the wording of the relevant clause, ensuring it allocates risk at an appropriate level. Poorly drafted indemnity clauses frequently lead to disputes, and the party providing the indemnity should assume any ruling will likely go against it.

Such a ruling occurred in *Woolworths Group Ltd v Twentieth Super Pace Nominees Pty Ltd* [2021], where the NSW Supreme Court confirmed that agreements which include indemnity clauses should be construed *"...on the assumption that the parties intended to produce a commercial result, one which avoids making commercial nonsense or working commercial inconvenience"*.

In circumstances where there is uncertainty regarding the interpretation of an indemnity clause either because it is ambiguous in its meaning or it is unclear as to the width of its possible application, a court can be expected to apply the clause in favour of the indemnified party.

TIPS

When negotiating indemnity clauses, the indemnifier should consider the following points:

1. Is the indemnity needed at all? If each party is satisfied with the level of cover afforded by common law, the answer is probably 'no'. The clause should be deleted from the contract.
2. Are the indemnities which are being requested open ended or uncapped? If so, the indemnifier should not agree to them, but insist on a monetary limit after first consulting its insurance provider to ensure any agreed amount does not void its cover.
3. What is the duration of the indemnity? The indemnifier should limit the time during which any claims can be brought - for example, within six years from the completion of the works.
4. The clause should exclude any damage or loss caused by (or contributed to) the indemnified party, including those caused by (or contributed to) by that party's own negligence, breach of contract, fraud or wilful acts.
5. There should be an expressly written obligation on the indemnified party to mitigate any of its loss. This will reduce the indemnifier's exposure in a claim under the indemnity provision.
6. Can the indemnifier meet the indemnity should the clause be triggered? Does it have the financial resources to make good on its promise and has it planned how such a payment will be funded? The indemnifier may require additional protection through insurance or some other arrangement (such as a third-party guarantor).
7. Avoid words that may lead to confusion or ambiguity, such as:

- 'arising out of'

  "The words 'arising out of' are wide. The relevant relationship should not be remote, but one of substance albeit less than required by words such as 'caused by' or 'as a result of'. The phrase connotes a weak causal relationship" [Erect Safe Scaffolding (Australia) Pty Ltd v Sutton (supra) at [11]].

- 'in connection with'

  "The expression 'in connection with' is capable of having a wide meaning, but its meaning must be derived from the context in which it is used. The words 'in connection with' have been accepted as capable of describing a spectrum of relationships between things, one of which is bound up with or involved in another. The question that remains in a particular case is what kind of relationship will suffice to establish the connection contemplated by the contract. In the present context there must be a sufficient nexus between the use of the plant and the injury." [Fraser v The Irish Restaurant and Bar Co Pty Ltd [2008] QCA 270 at [40].]

Contractual indemnities are a powerful tool to transfer risk for certain events from one party to the other. However, they are not always necessary, and parties should carefully consider the specific circumstances before agreeing to them. If an indemnity is to be provided, care should be taken when drafting the clause to ensure it clearly reflects the intention of the parties.

The High Court has made its decision – who is entitled to compensation?

Authors: Laura Raffaele & Maja Podinic

With a legislative history spanning just under two years, the decision of the NSW Court of Appeal in *Olde English Tiles Pty Ltd v Transport for New South Wales* has divided both the public and legal practitioners. So it comes as no surprise that the Applicant applied for special leave to the High Court of Australia. Interested parties have been eagerly waiting to see the High Court's decision.

The power of five words - "special is refused with costs" – should not be underestimated. The High Court has now affirmed the Court of Appeal's decision, changing the legal landscape of compulsory acquisitions.

BACKGROUND

In 2018, land in Camperdown owned by Antonio and Carmel Gaudioso was acquired by Transport for NSW. Mr and Mrs Gaudioso were also the sole directors and shareholders of the business Olde English Tiles, which occupied the acquired land pursuant to a bare licence (a permission to occupy the land but is terminable at will).

In the primary proceedings, Olde English Tiles conceded they did not have a market value claim for their occupancy right. However, they nonetheless claimed compensation for disturbance under section 59(1)(c) of the *Land Acquisition (Just Terms Compensation) Act 1991* (Just Terms Act).

The crux of the matter fell to the interpretation of 'interest' in land as defined under section 4(1)(b) of the Just Terms Act. An applicant must prove they have an interest which constitutes a 'right, power, or privilege over, or in connection with' the land. Without this, an applicant is not entitled to compensation.

The Land and Environment Court held that Mr and Mrs Gaudioso's personal interest did not constitute a compensable interest and they were not entitled to disturbance. In its decision, the Court referred to *Dial A Dump Industries Pty Ltd v Roads and Maritime Services* [2017] Court of Appeal 73 (DADI) and *Hornsby Council v Roads and Traffic Authority of New South Wales* (1997) 41 NSWLR (Hornsby).

THE APPLICANT APPEALED THE DECISION.

The five-Judge bench of the Court of Appeal unanimously affirmed the decision for the following reasons:

1. An interest in land must be legally enforceable and capable of being divested, extinguished or diminished by the acquisition (section 20 of the Just Terms Act).
2. The right to claim compensation under section 55(d) and section 59(1) of the Just Terms Act is contingent upon having a right to claim compensation for the market value of the interest divested.
3. It is inappropriate to overturn the decisions of DADI and Hornsby Council, when it was those decisions that prompted Parliament to legislate substantial amendments to the Just Terms Act in 2016. Those decisions have helped clarify the scope and operation of the Just Terms Act and gives the Court even more reason not to overturn them.

Following the Court of Appeal judgment, there was debate as to whether it had correctly interpreted the intention of the Just Terms Act. Specifically, was the intention to exclude applicants with unenforceable or personal interests (for example, licences at will or permission to use land) from being compensated? And what about the consequential effects on applicants with leasehold interests who were not claiming market value?

THE HIGH COURT'S DECISION ON THE SPECIAL LEAVE APPLICATION

On 17 February 2023, the High Court refused the special leave application based on insufficient prospects of success. The Court only needed to hear oral submissions from Counsel for the Applicant before coming to this decision.

Although short, the line of questioning from the High Court was telling as to what would warrant a special leave application. That is, sufficient reasoning as to why DADI and Hornsby needed to be reconsidered or overturned. Given these decisions sparked amendments to the Just Terms Act in 2016, this was no easy feat.

Counsel for Olde English Tiles submitted that the issue with Hornsby was that it implied there must be a limitation to the definition of interest, arguing that a contextual meaning of the words should be adopted instead.

Edelman J of the High Court asked whether a 'no limitation' approach was appropriate given it would entitle anyone "in the sense of a broad ability to use the land" to compensation. In response, Counsel submitted that entitlement is not for 'anyone', but rather is based on whether there is something for which money's worth ought to be paid; that is, significance of market value.

In this case, Mr and Mrs Gaudioso were both controllers of the land and controllers of the corporation which occupied the land. Therefore, a lawful permission to occupy the land was spelled out from that privilege. Counsel argued that, although this privilege was terminable at will, there was value in the occupation of the land because they were carrying on a business.

Edelman J noted that the arrangement with Mr and Mrs Gaudioso and Olde English Tiles did not confer an interest in the land in any legal sense. Counsel conceded that permissive occupancy by way of privilege does not give a proprietary interest in the land.

Again, as in the LEC and the Court of Appeal, the definition of interest was the salient point.

Counsel argued that Hornsby was silent on the proper meaning of the expression as defined in section 4(1)(b) in the Just Terms Act; namely:

> *An easement, right, charge, power or privilege over, or in connection with the land*

Edelman J continued to press for details as to the limitation of the definition – that is, whether any contractual right, terminable by will or not, would have to be compensated if land was compulsorily acquired.

Counsel could not answer this without considering the terms of those contractual rights, but went on to say that there was a lack of instrument, and that no 'perfect legal carpentry' to expressly support that interest should capture those terminable by will. He turned to the statute title, "Just Terms", to suggest its plain and beneficial purpose.

Counsel went on to suggest that the word 'privilege' in section 4(1)(b) of the Just Terms Act should include the many forms of non-contractual (and therefore, terminable at will) occupancies, which immunise one against the claim of trespass.

This was a common term referred to in Counsel's submissions – immunisation against the claim of trespass – suggesting that this is simply what was missing in the definition, and what was needed to open the door to a claim for disturbance for privileges or rights which may not have a defined 'legal interest'.

The High Court only needed a four-minute adjournment before deciding there were insufficient prospects of success to warrant special leave to appeal.

WHY IS THIS IMPORTANT?

The effects of this case on the future of compulsory acquisition claims cannot be understated. By dismissing the special leave application, the High Court affirms that the Just Terms Act should operate in a 'limiting' capacity. It does not exist as a 'free for all'.

There are two readings we can take from this:

1. The special leave refusal solidifies the judgment of the Court of Appeal, and also has the potential to reiterate the intention and purpose of the Just Terms Act. It will be interesting to see the creativity of applicants in trying to circumvent the judgment:
    - if they do not have a defined 'legal interest' pursuant to the definition; or
    - if they do have a defined 'legal interest', but no market value claim.
2. The second reading is that '*no market value means no compensable interest*' is obiter dicta and acquiring authorities are to continue negotiations as usual. Even if acquiring authorities adopt this approach, we anticipate that whilst an interested party may try to negotiate compensation absent a market value claim, they are less likely to appeal to the Land and Environment Court.

It may take another case to go through the Court dealing with this issue directly before we see a change, however, given the number of current acquisitions by State Authorities, it may only be a matter of time before we see the effects of this decision playing out.

How principals can effectively manage defects & delays in projects

Authors: Mario Rashid-Ring and Nicholas Kallipolitis

The current construction landscape is characterised by more insolvencies, fewer contractors and contractual mechanisms with less practical force.

Defects and delays in construction and infrastructure projects have long been a thorn in the side of principals. Historically, however, principals have been in an excellent position to seek remedies by virtue of a much stronger bargaining position during initial contract negotiations.

While that bargaining strength remains, principals now face the real prospect of a contractor becoming insolvent or being unable to rectify defects. In that case, achieving meaningful remedies may be a lost cause.

Trends that have led to difficulties for contractors include:

- A significant increase in material and labour prices coming at the same time that many contractors are still recovering from the impacts of COVID-19.
- Greater risk due to legislative reforms in the wake of the Opal and Mascot Tower incidents. For instance, the *Design and Building Practitioners Act 2020 (NSW)* has caused many operators to consider whether the increased – and often personal – liability resulting from these reforms is worth the marginal profits they are making.
- Contractors regularly tendering for projects with little or no margin to either stay competitive or "keep the wheels turning". In this environment, projects become unprofitable as soon as there is an unanticipated expense and the number of insolvencies goes up.
- A shortage in the availability of subcontractors who are even less insulated from the factors above than their larger counterparts. A consequence of this is that should one subcontractor become insolvent, finding a replacement is likely to be difficult.

WHAT SHOULD I DO?

The contract will be the main source of a principal's rights and of each party's obligations. Contracts will vary in their details but will usually include provisions regarding defects and delays.

Defective works

The key contractual mechanisms that protect principals against defective works are:

- the defect liability period and security
- set off and step-in rights
- warranties and indemnities.

These either allow a principal to compel a contractor to rectify defects or, alternatively, allow the principal to rectify the defects and attempt to recover costs from the contractor.

One difficulty principals are increasingly facing is contractors unable to rectify defects because of cashflow issues, labour shortages or material issues. In these situations, a principal will usually have recourse to the contractor's security but there may be a shortfall between actual rectification costs and the value of that security.

To minimise the risks associated with this, principals should:

- actively engage with the contractor during the project, attend project meetings and ensure that quality control measures are being followed throughout the project so that potential issues are identified early
- consider whether variation claims are reasonable and fairly assessed
- consider whether the value of security is appropriate to the risk
- undertake due diligence before committing to a major project in order to confirm the sound financial state of the contractor and obtain suitable guarantees from parent companies
- seek appropriate insurances including an adequate level of construction risk insurance.

Project delays

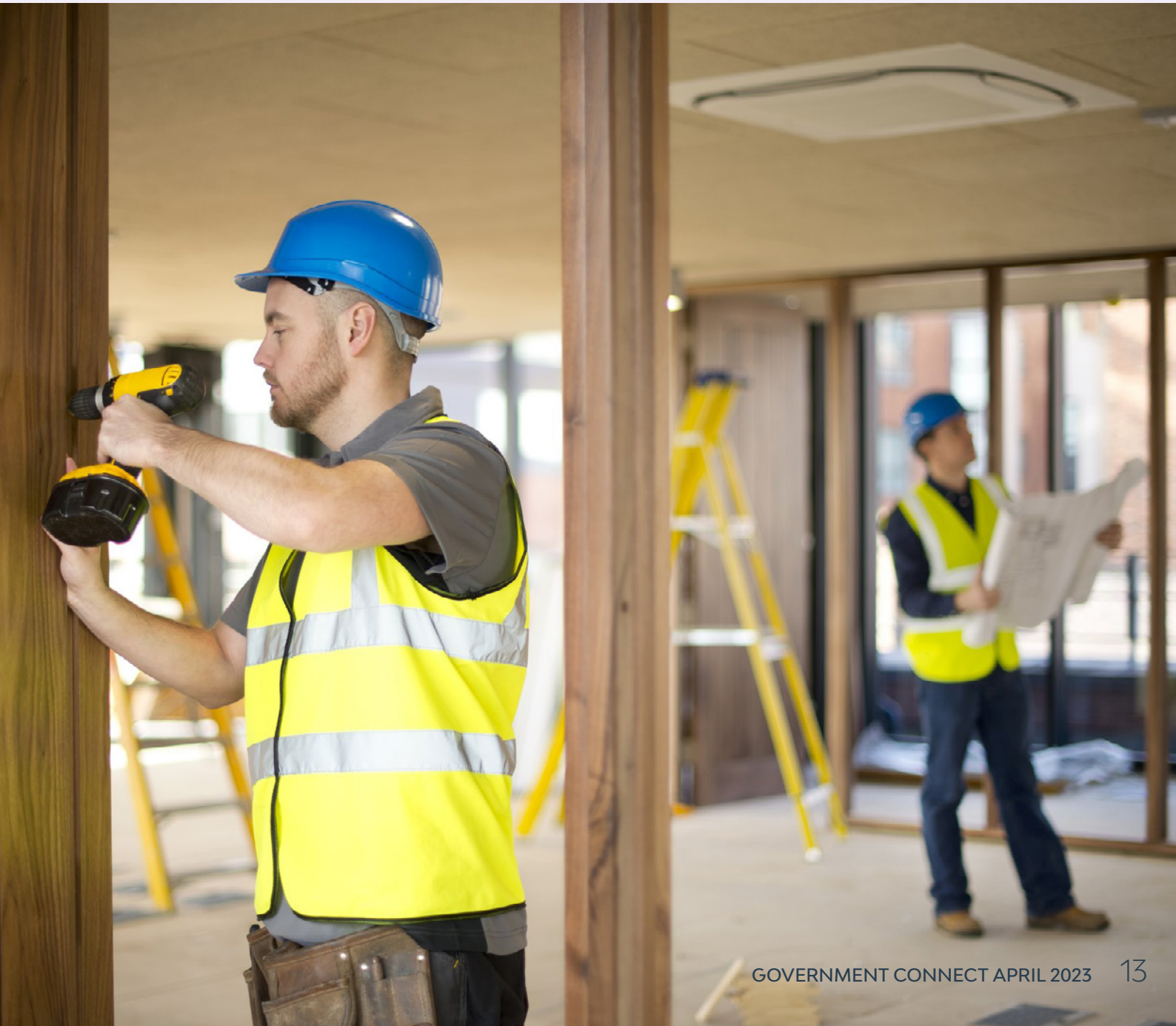
The key contractual mechanisms protecting principals against project delays are:

- delay notices
- notifications and claims for extensions of time
- liquidated damages.

As with defects, these mechanisms may be of little practical use if the contractor becomes insolvent. Practical steps a principal can take to mitigate these risks are similar and involve:

- proactively monitoring the construction program against actual works
- considering whether extension of time claims are reasonable and being fairly assessed
- attending project meetings and having open discussions to progress the project
- considering whether early intervention is possible through step-in rights
- ensuring the head contractor and subcontractors are paid on time (after confirming subcontractor statements are accurate)
- considering whether a lack of progress is a symptom of contractor insolvency.

In the current climate, principals who do not take these steps are putting themselves at risk of being caught out by subcontractor insolvency and projects running over time and budget. While such delays and costs may be the legal responsibility of the contractor, the principal will still be left to deal with significant costs themselves (financial and reputational) resulting from delays and defects.



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

SUB PANEL 1
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- 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
ADMINISTRATIVE LAW, GOVERNMENT AND REGULATORY

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

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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
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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Other services include liability litigation, general litigation, dispute resolution and debt recovery, inquiries.

CLUSTER	CLUSTER RELATIONSHIP PARTNER
Premier & Cabinet	James Mattson
Treasury	Darren Gardner
Planning, Industry & Environment	Dennis Loether
Customer Service	Rebecca Hegarty
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 panel relationship partner James Mattson or any of our cluster partners 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 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 by NSW Government agencies, 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.

CPD, 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 110 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.

Please email info@bartier.com.au

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