GOVERNMENT CONNECT

Bartier Perry LAWYERS

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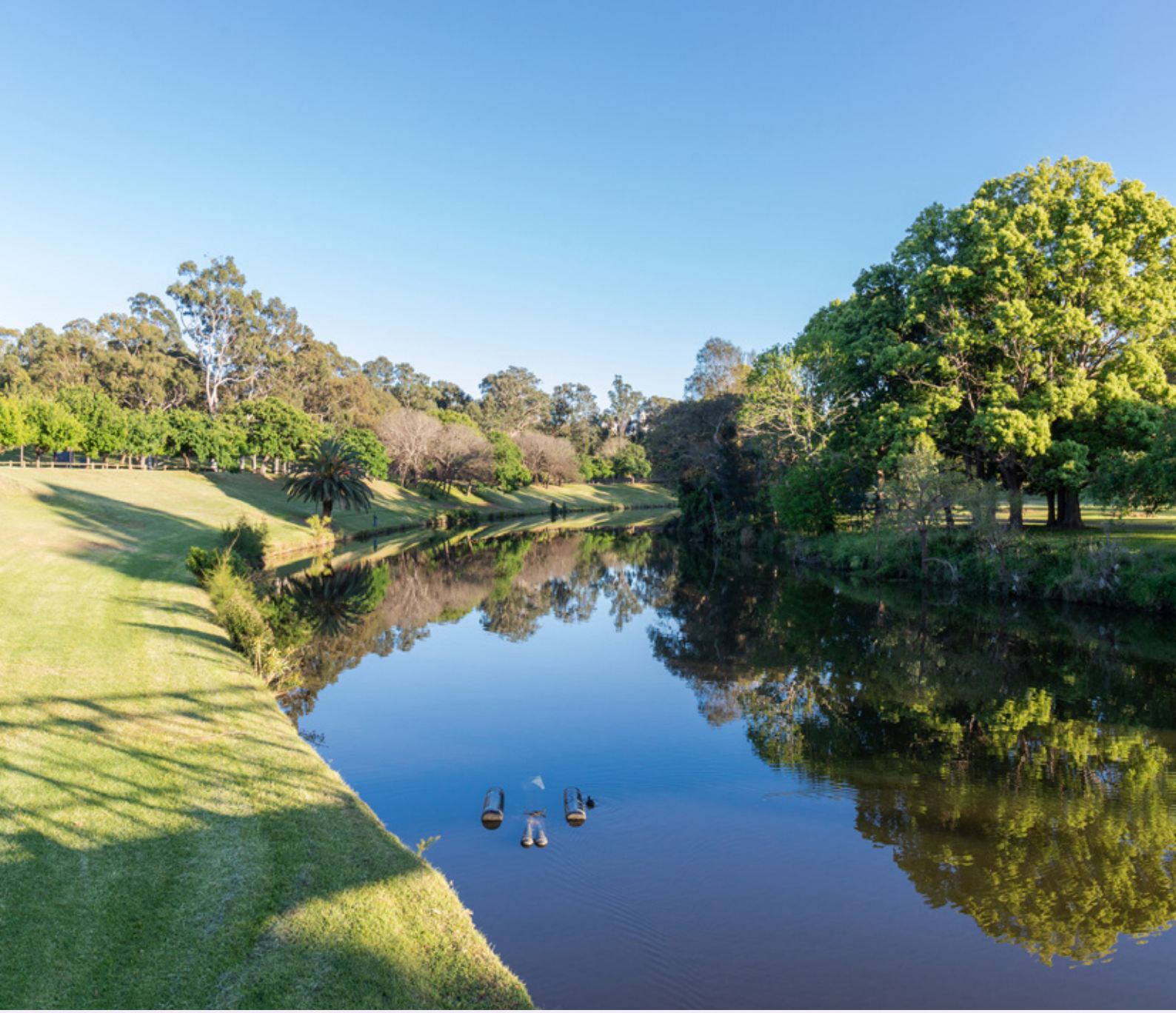

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INTRODUCTION

Welcome to our December 2024 Government Connect.

This issue aims to address some of the latest issues impacting NSW government operations. This edition covers significant developments across industrial relations, technology, privacy, property, contract law, and construction legislation, all with a focus on assisting public sector entities to navigate evolving legal landscapes.

Our authors explore a number of recent decisions, including a significant industrial relations case where patient safety outweighed strike actions, reminding agencies of the importance of swift, strategic responses.

Our AI article outlines ethical considerations and frameworks, ensuring government agencies leverage AI responsibly. Preparing for proposed privacy reforms is crucial; we offer guidance on aligning policies and systems with these changes.

A court ruling on land acquisition compensation offers insights for government property transactions. We cover the Unfair Contract Terms Regime's implications for fair property agreements, promoting trust and transparency. Finally, the new *Building Legislation Amendment Act* reinforces safety, quality and accountability in construction.

We hope this issue of Government Connect provides valuable insights and practical strategies to support your work.

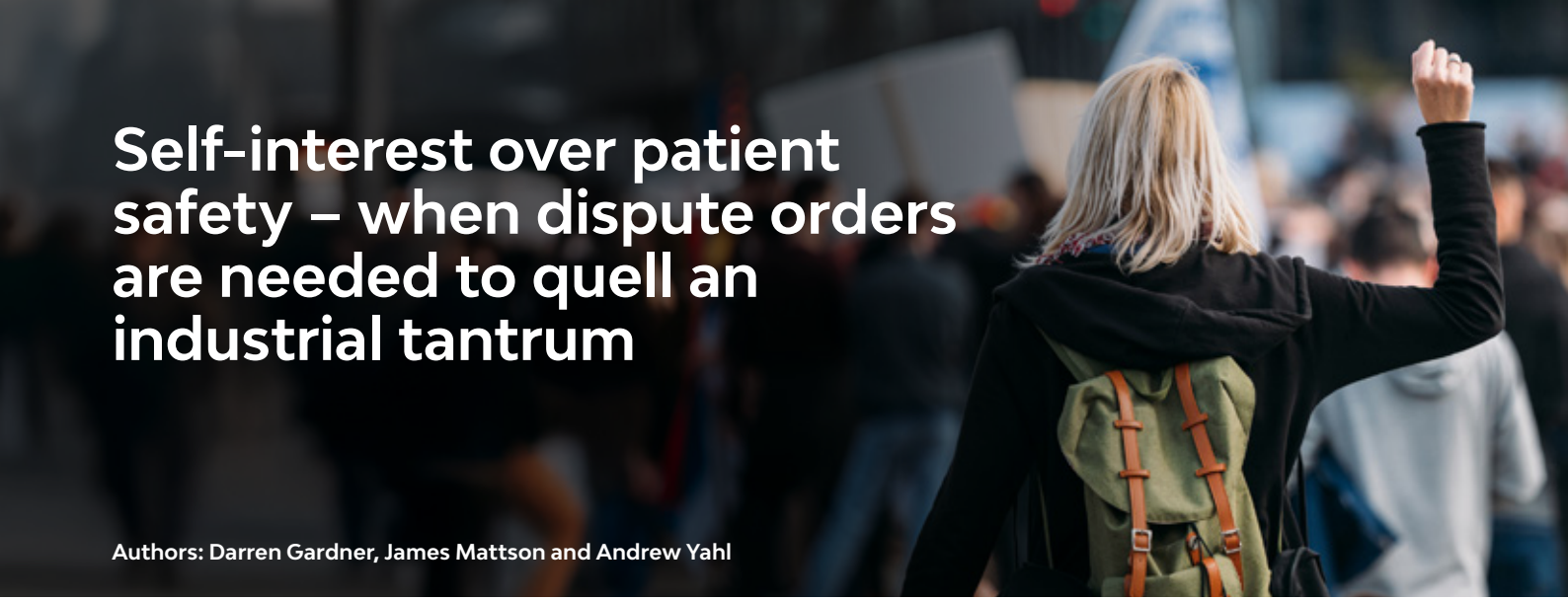
As always, if there are specific value adds we can provide you with, or if you would like to chat about any subjects in this issue, please reach out to myself or any of our NSW Key Team listed on the back pages.

We wish you and your families a wonderful festive season and look forward to working with you in 2025.

Warm regards,
James Mattson

Partner,
Workplace Law & Culture

NSW Government Cluster Partner – Health, Premier and Cabinet and Communities and Justice



Self-interest over patient safety – when dispute orders are needed to quell an industrial tantrum

Authors: Darren Gardner, James Mattson and Andrew Yahl

Strike action is a common strategy of unions to put pressure on employers. However, it's not a blunt instrument that can be used at the expense of patient welfare; broader considerations do, and should, come into play.

If participants are not conscious of the broader considerations, they may be told that they can't proceed with strike action, which is what happened to the NSW Nurses and Midwives Association (NSWNMA). We explore this case, where Bartier Perry acted for NSW Health, below.

PAY ME MORE

NSW Health has been in long-running pay negotiations with the NSWNMA.

During negotiations, the NSWNMA took matters into its own hands when, despite having invoked the Industrial Relations Commission's processes, it organised, and encouraged, its members to engage in strike action when it wasn't getting what it wanted.

Its conduct was described by Taylor J as a *"matter of some concern"*: *Health Secretary, NSW Ministry of Health v New South Wales Nurses and Midwives Association* [2024] NSWIRComm 4 at [12].

Parties cannot come to the Commission, invoke its processes, and then have a tantrum when they do not get their way. The Commission has powers to intervene where industrial action is inappropriate.

WHAT WAS THREATENED?

On the afternoon of Thursday 5 September 2024, the NSWNMA published a statement on its website that there would be a strike from 7am to 7.30pm the following Tuesday, 10 September. This was in response to pay negotiations, and despite conciliation being scheduled for 18 September.

There wasn't much time. NSW Health had to act fast.

WHAT COULD BE DONE?

The Commission has broad powers to deal with industrial disputes under Ch 3 of the *Industrial Relations Act 1996* (IR Act). The first step is conciliation. On Friday 6 September, the day after the NSWNMA announcement, NSW Health called on the Commission to urgently deal with its dispute in relation to the planned strike.

Commissioner McDonald in *Health Secretary, Ministry of Health v NSW Nurses and Midwives' Association* [2024] NSWIRComm 1056 recommended that the NSWNMA and its officers, employees and members refrain from organising and taking any industrial action from 10 to 18 September, the date of the scheduled conciliation.

On Saturday 7 September, the NSWNMA decided it would not comply with the recommendation.

The only option for NSW Health was to move the Commission for dispute orders pursuant to section 137 of the IR Act. They include the ability to order that someone cease or refrain from taking industrial action. There are consequences for contravention.

Whether to make a dispute order is at the discretion of the Commission. It is therefore incumbent on the party moving the Commission to convince it that such an order is necessary. This is not always easy, as illustrated when the Commission stated, in *Bluescope Steel (AIS) Ltd v Australian Workers' Union (NSW)* (2005) 138 IR 324:

> *Dispute orders are rarely made by members of the Commission. Long experience has demonstrated that most matters can be resolved by conciliation and/or arbitration without resorting to the prospect of sanctions. The making of a dispute order is a serious step given the consequences for contravention. Persons against whom a dispute order is made are bound to take it seriously, especially members, officials and employees of organisations who may be putting in jeopardy the very existence of their organisation.*

Under the IR Act, the Commission must take into account the public interest. Mandatory considerations outlined in section 146(2) in that regard include:

- the objects of the IR Act
- the economy of NSW and effects of the decision in that regard
- in relation to the public sector, the fiscal position and outlook of the Government and effects of the decision in that regard.

This has been said to involve very broad considerations, beyond those

mandated by section 146: *Secretary of the Ministry of Health v The New South Wales Nurses and Midwives' Association* [2022] NSWSC 1178 at [50]. The Commission has accepted that this consideration extends to the health and welfare of the citizens of NSW.

In terms of the importance of the ability to make the orders, it was stated in *Bluescope*:

> *The ability, in arbitration, to order industrial action to cease—to enable the parties to resolve the dispute efficiently and fairly under the auspices of the Commission rather than leaving the matter to be determined by the economic and industrial power of the participants without reference to the public interest — is one of the most important features of the system created by the Act.*

It was with those principles in mind that we were tasked with convincing the Commission that orders should be made here.

NURSES TOLD IT WAS A NO GO

We were successful at convincing Chin J that the dispute orders were necessary in these circumstances in *Health Secretary, Ministry of Health v NSW Nurses and Midwives' Association* [2024] NSWIRComm 3, on the following grounds:

1. The issues underlying the industrial action were, in effect, the same as the matters already before the Commission for imminent conciliation, and the arbitral powers of the Commission had not yet been utilised.
2. The conduct of the parties before the Commission, including the NSWNMA's refusal to comply with the recommendation of the Commission.
3. The convincing evidence led by NSW Health of the actual and potential impacts of the strike, which included surgeries and treatments needing to be cancelled or postponed.
4. The status quo provisions of the *Public Health System Nurses' and Midwives' (State) Award 2023*.

Justice Chin ordered that the NSWNMA and its officers, employees and members refrain from organising and taking any industrial action from 10 to 18 September.

There were also associated orders and directions to give effect to that.

CONCLUSION

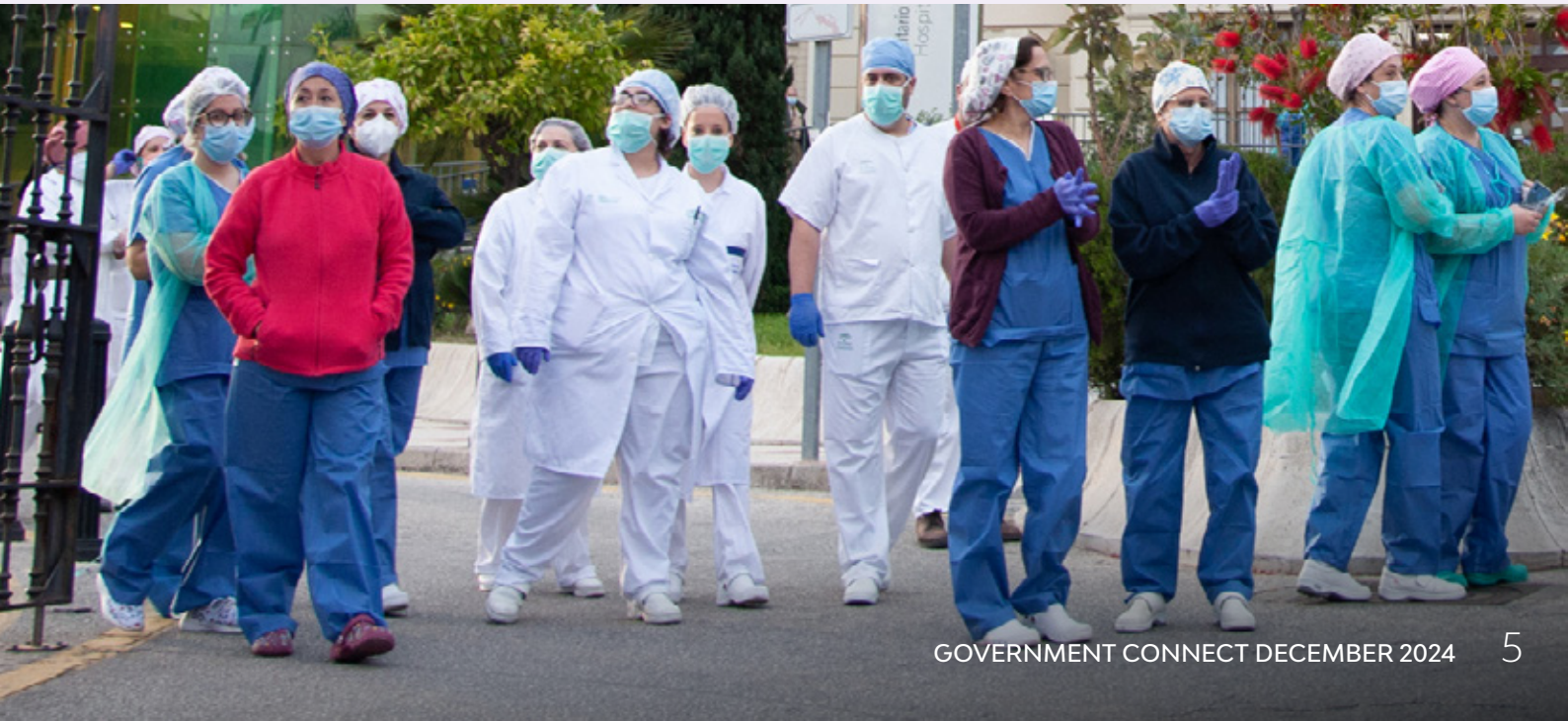
When the matter came before Taylor J on 18 September 2024, he made the following comments in *Health Secretary, NSW Ministry of Health v New South Wales Nurses and Midwives Association* [2024] NSWIRComm 4:

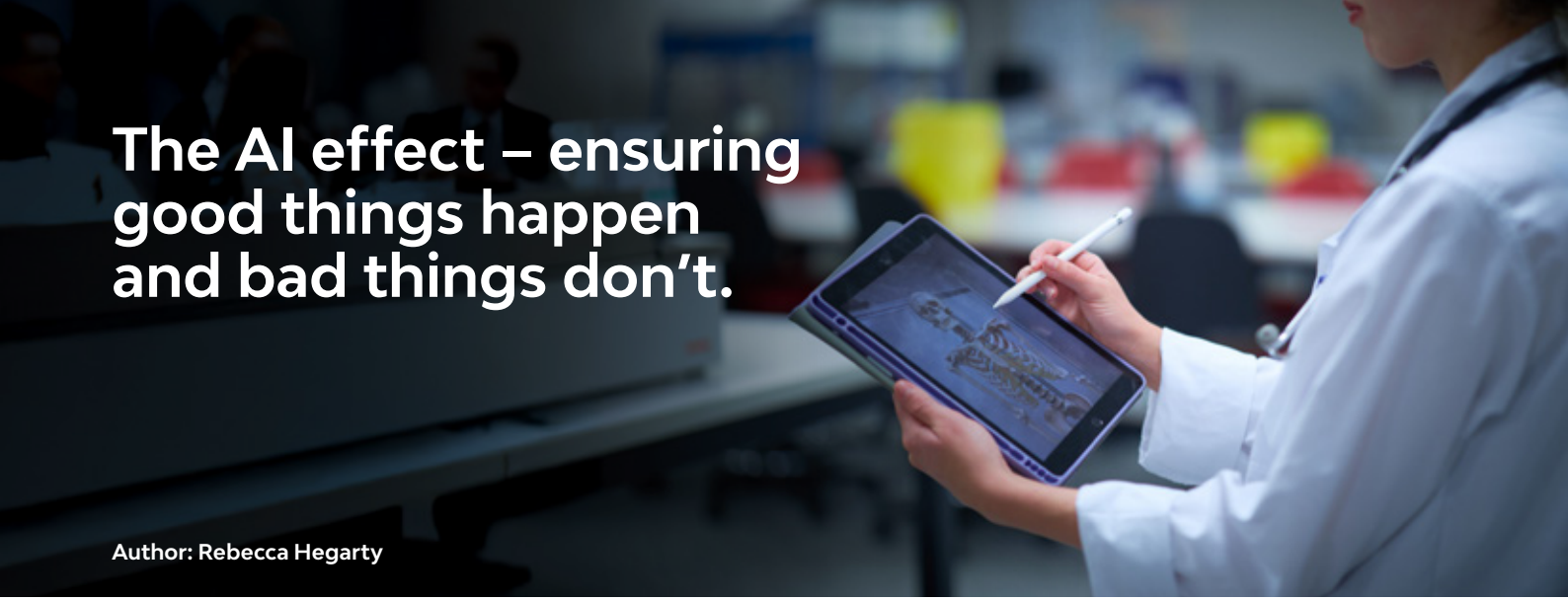
> *[16] Industrial action does not just cost nurses pay. It has, as Chin J identified, real world effects on patients and the public. Patients can have waited significant periods of time for their elective surgery. Those are periods of time when they can be in pain. Their families have been supporting them. Their families are also affected by industrial action. It is not in the public interest that industrial action be taken.*
>
> *[17] The way to resolve these issues is to utilise the powers of the Commission. But can I say this, the Commission does not arbitrate changes in pay and conditions whilst industrial action is occurring.*

These proceedings serve as a sound warning for unions and industrial associations: they can't have it both ways. They can't call on the Commission to assist but then throw the toys out of the cot when things don't move as swiftly as they would like.

Actions have consequences, and parties before the Commission would be well advised to observe and respect its processes.

For employers under threat of industrial action, swift action is required, and there are options to help limit its impacts.





The AI effect – ensuring good things happen and bad things don't.

Author: Rebecca Hegarty

Artificial Intelligence (AI) presents significant opportunities for how government agencies conduct contract and procurement processes. However, it also poses risks. That is why a foundational guide on the use of AI is important.

THE NATIONAL FRAMEWORK

In June 2024, the Department of Industry Science and Resources published the National Framework for Assurance of Artificial Intelligence in Government as an approach to safe and responsible use of AI by the Australian, state and territory governments. It not only lays a foundation for the ethical and responsible use of AI, but also identifies the risks to be managed.

UNDERSTANDING THE NATIONAL FRAMEWORK FOR ASSURANCE OF AI IN GOVERNMENT

The framework is designed to ensure that AI systems used by government agencies are ethical, transparent, and reliable and that it is aligned with public values and laws. It sets a national foundation around which jurisdictions can develop specific policies and guidance.

The framework, based on *Australia's AI Ethics Principles*, encompasses these principles:

1. **Transparency:** Government agencies should be transparent about their use of AI, ensuring disclosure to those who may be impacted by it. Government should comply with all laws, policies and standards for keeping reliable records of decisions, testing, information and data used in an AI system. For use in decision-making processes, government should provide simple explanations for how an AI system produces an outcome.
2. **Accountability:** Government agencies must take responsibility for the AI systems they procure and deploy. This includes being accountable for any biases or errors that may arise from the system, as well as ensuring proper oversight and review.
3. **Fairness:** Government agencies must ensure AI systems operate in a non-discriminatory manner, ensuring fairness in outcomes and avoiding bias against any individual or group.
4. **Reliability and Safety:** AI systems must perform as expected, ensuring they are reliable and safe to use in critical government functions. These systems must undergo rigorous testing and validation to ensure their integrity.
5. **Data Privacy and Security:** Protecting the data used by AI systems is crucial, particularly given the sensitive nature of government data. The framework places strong emphasis on ensuring that data privacy and security measures are in place to prevent unauthorised access or misuse of information.
6. **Ethical Use:** Government agencies should ensure that AI systems they use are aligned with ethical guidelines and public values, are used for the benefit of society, and do not cause harm.

IMPACT OF THE FRAMEWORK: MORE RIGOUR, GREATER ACCOUNTABILITY

The rise of AI has seen an increasing demand for AI-powered solutions in healthcare, law enforcement, education, infrastructure management and elsewhere. Integrating AI into these systems introduces unique challenges for the procurement and contract negotiation process.

Below are key areas where the framework is reshaping government procurement processes:

1. MORE STRINGENT VENDOR SELECTION CRITERIA

The framework requires government agencies to thoroughly assess the AI systems they procure to ensure they align with ethical and legal standards. This means exercising a more stringent vendor selection criteria, where companies bidding for government contracts must demonstrate compliance with the framework's principles if the contract is for AI or encompasses its use.

Vendors should provide detailed documentation on how their AI systems address transparency, fairness, and accountability. For example, they may need to show how their algorithms are designed to avoid bias, how decision-making processes are documented and explainable, and how they plan to address potential ethical concerns.

This shift ensures that only those AI vendors with robust assurance mechanisms can secure government contracts. It also encourages vendors to invest in ethical AI systems, thus raising the overall standards of AI development.

2. EMPHASIS ON TRANSPARENCY AND EXPLAINABILITY

Government agencies should prioritise AI systems that provide clear, explainable decision-making processes. This is particularly important for high-stakes government functions, such as law enforcement, social services, or healthcare, where decisions made by AI systems can significantly impact people's lives.

Government agencies may require vendors to demonstrate how their AI systems work, explaining how decisions are reached and how data is used. This ensures AI systems are not "black boxes" and that government officials can understand and oversee their operation.

Moreover, this fosters greater trust between government and the public. When AI systems are explainable, people are more likely to trust that decisions made by these systems are fair and unbiased, particularly in areas like social welfare, criminal justice, and public policy.

3. ACCOUNTABILITY AND LIABILITY IN CONTRACTS

The framework's emphasis on accountability makes incorporating specific accountability clauses into contracts with AI vendors important. They should clearly define who is responsible for any errors, biases, or malfunctions that may arise from the AI system's use.

Contracts may also include provisions for regular audits of AI systems, requiring vendors to submit their algorithms for external review to ensure they remain compliant with ethical guidelines. Clauses may also be included that allow government agencies to terminate agreements if the AI system is found to be discriminatory or otherwise harmful to public interests.

4. FOCUS ON BIAS AND FAIRNESS IN PROCUREMENT PROCESSES

Addressing bias is one of the most pressing concerns in the deployment of AI in government services. The framework's emphasis on fairness requires government agencies to carefully evaluate AI systems for potential biases that could lead to unfair outcomes for certain individuals or groups.

In the procurement process, this means agencies must assess the datasets used to train AI models, ensuring they are representative and free from bias. Vendors are often required to demonstrate how their AI systems are tested for fairness and what measures they have in place to mitigate any bias that may emerge during deployment.

5. DATA PRIVACY AND SECURITY PROVISIONS IN CONTRACTS

The framework places strong emphasis on data privacy and security. Government agencies must ensure that AI systems they procure adhere to strict data privacy regulations, particularly when dealing with sensitive personal information.

As a result, government contracts should include detailed provisions on how vendors must handle data, including requirements for data anonymisation, secure storage, and limits on data access. Vendors may also be required to conduct regular security audits to ensure their systems are protected against cyberattacks or data breaches.

CONCLUSION

The National Framework for Assurance of Artificial Intelligence in Government is a significant step forward in ensuring the responsible use of AI in public sector operations. By emphasising principles such as transparency, accountability, fairness, and data privacy, the framework provides a solid foundation for governments to procure and deploy AI systems that align with public values and ethical standards.

This framework is reshaping how governments evaluate AI vendors and systems. By setting higher standards for AI development and implementation, it ensures that government agencies can harness the benefits of AI while minimising the risk of bias, discrimination, and unethical use.

Preparing for the privacy reforms – heightening individual protections

Authors: Gavin Stuart and David de Mestre

Privacy concerns remain at the forefront of public policy following recent highly publicised cyber security breaches. Criticism of institutional responses to these events simply highlights expectations that Australia's privacy laws keep pace with digital innovations such as artificial intelligence.

In the May 2024 edition of Government Connect, we explained amendments to the *Privacy and Personal Information Protection Act 1998* (NSW) aimed at public entities including NSW government agencies, universities and NSW local councils.

This article addresses the proposed reforms to the *Privacy Act 1988* (Cth) designed to increase individual privacy protections and modernise Australia's privacy laws in light of growing concerns around data security. We also look at how NSW government agencies can best prepare for the proposed reforms.

TIMELINE FOR REFORMS

Almost a decade since the last major review of Australia's privacy legislation, the *Privacy and Other Legislation Amendment Bill 2024* **(Bill)** was introduced to parliament this September. The Bill comes after:

- recommendations made in the Australian Competition and Consumer Commission's 2019 *Digital Platforms Inquiry Report*
- a consultation period (including an Issues Paper and Discussion Paper) between October 2020 and January 2022
- the Attorney-General's *Privacy Act* Review Report, released in February 2023
- the Government's response to that report, released in September 2023.

The Bill is the first of two proposed tranches of reforms to the *Privacy Act*, meaning the changes will be ongoing and are envisaged to provide greater enforcement powers to the regulator, the Office of the Australian Information Commissioner (**OAIC**).

PROPOSED REFORMS

The most significant of the proposed reforms to the *Privacy Act* (many of which will be implemented by reference to the Australian Privacy Principles under the Act) include:

Issue	Reform
Children's Online Privacy Code	This seeks to codify previously non-binding privacy principles concerning children's privacy in the use of social media and online platforms. It will require organisations to implement policies and procedures concerning the best interests of the child and will likely be implemented in conjunction with related legislative reforms (for example, age restrictions for social media usage).
Individual Rights	Heightened individual protections will include the ability to request the erasure (withdrawal of consent) of personal data and the right to data portability. Additionally, a new cause of action for serious privacy breaches will allow individuals to seek redress more easily and subject organisations to civil contravention penalties.
Cross-border data flows	A mechanism to streamline data flows between countries. Schemes similar to Australia's privacy principles will encourage cross-border commerce and data sharing while protecting individual privacy.
Consent & Notice Requirements	The reforms propose stricter requirements for obtaining consent and aim to ensure consent is both informed and freely given. There will also be expanded notification requirements for certain use and disclosure events (including notification of breaches to the OAIC) triggering the individual right to withdraw consent.
Increased Penalties / Enforcement Powers	Greater flexibility and discretion for the regulator to enforce privacy laws are offered in the Bill. This includes the power for the OAIC to conduct public inquiries and a new determination power to provide support after breach events. These aspects of the reforms, which are presented in the form of a tiered enforcement regime, respond to challenges faced by the OAIC in imposing civil penalties for data and privacy breaches and will facilitate a more case-specific response (including in the case of emergencies with temporary declaratory powers).

The *Privacy Act* (and the proposed reforms) applies to "organisations" including small businesses with annual turnover of $3 million or more (except where they trade in personal information or are health service providers) and state and territory government agencies prescribed by regulation 8 of the *Privacy Regulations 2013* (Essential Energy, Ausgrid and Endeavour Energy).

Arguably the most hotly anticipated reform is a new statutory tort for serious privacy invasions (with exceptions including journalists and enforcement bodies) – a significant development where there was previously no express right to individual privacy in Australia. Additionally, the Bill proposes to criminalise the menacing or harassing misuse of personal data (for example, by doxxing).

The reforms seek to address the following public policy concerns regarding privacy and data regulation:

- the requirement to keep pace with the rapid advancement of digital innovation – especially artificial intelligence
- increased public concern for tighter privacy regulation following high-profile data breaches
- modernising Australia's privacy law regime to align with international standards and maximise Australia's competitive participation in global commerce
- growing demands for greater individual visibility and control over the use, storage and collection of personal data
- ensuring public and private organisations respond to individual consumer demands by holding them to greater account through stricter regulations and heightened penalties for breaches.

However, not all of the recommendations agreed to (either wholly or in-principle) by the government in its response to the *Privacy Act* Review Report are included in the Bill. It is likely that further consultation and future reform will occur with respect to matters including:

- expanding the definition of "personal information"
- organisational accountability and applicable exemptions for small business and employee records handling
- mandatory privacy impact assessments.

GOVERNMENT AGENCIES

The reforms proposed in the Bill will have several benefits for Australian government agencies, namely:

- greater flexibility in codifying and enforcing Australia's privacy laws, including through increased enforcement and regulatory powers, and the ability for the Australian Privacy Principles to be amended and expanded
- maximising the ability to respond to technological advancements
- enhancing Australia's competitive role in global trade and commerce by aligning Australia's privacy laws with international standards.

Conversely, the proposed reforms are not without challenges, specifically:

- the cost and administrative burden of updating/ implementing policies and procedures in light of the reforms
- greater funding needed for the OAIC to discharge its increased role
- increased scrutiny and potential delay arising from new rules governing interagency data sharing.

Government Information Public Access (GIPA) Act 2009 (NSW)

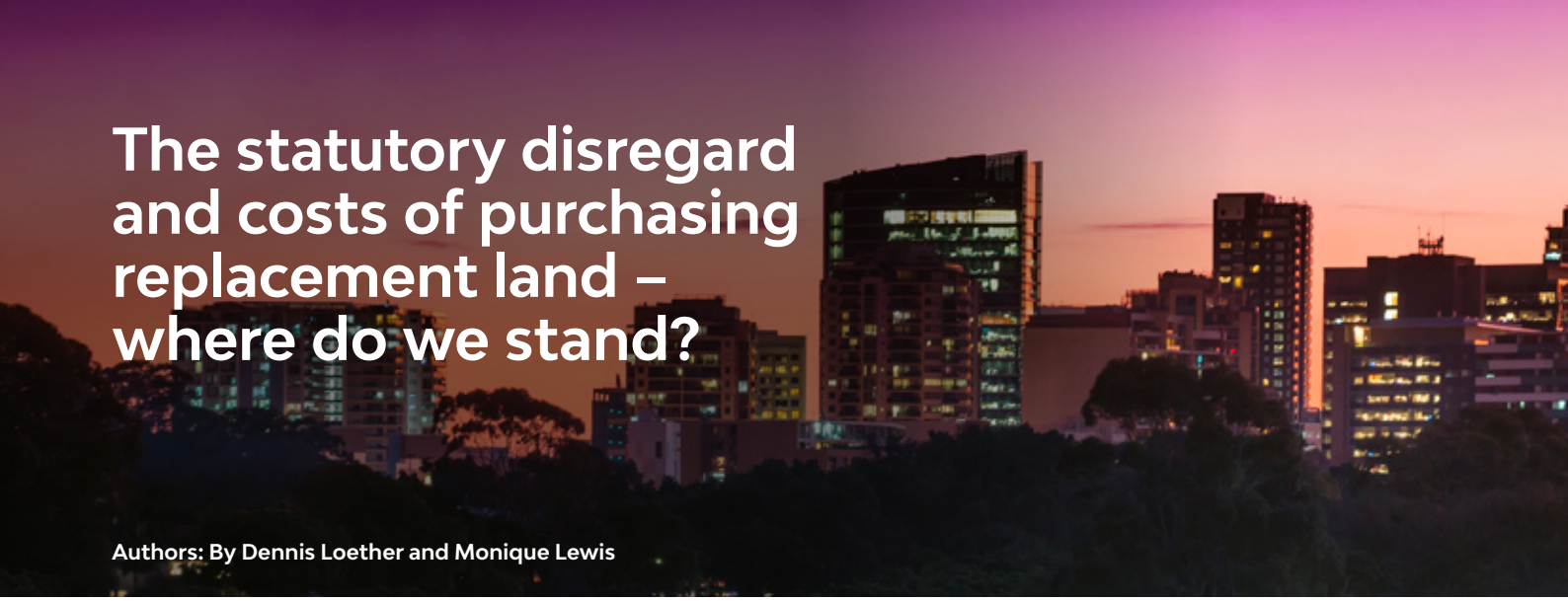
Furthermore, government agencies need to be aware of the potential impacts of the *Privacy Act* reforms on access to government information, specifically in the *Government Information Public Access (GIPA) Act 2009* (NSW) (**GIPA**). Anticipated consequences of the reforms to the GIPA regime include:

- limiting the information available through GIPA as a result of heightened individual privacy protections
- higher stakes and greater accountability for government agencies where GIPA disclosures may cause serious harm to individual privacy rights
- increased cost and administrative burden of responding to GIPA requests due to the need for greater caution and ongoing training.

HOW SHOULD GOVERNMENT AGENCIES PREPARE?

Although the Bill is yet to become law, the reforms are part of an ongoing shift towards heightened individual protection in privacy and data regulation. Therefore, impacted agencies should prepare for the introduction of the reforms, including by:

- ensuring privacy policies, GIPA policies and related procedures are reviewed and updated to align with the Bill and ongoing privacy reforms
- invest in systems and technologies which facilitate responsiveness to consent and notification requirements, including withdrawal of consent and erasure of individual data
- seeking advice and providing training on enforcement and regulatory risks
- considering resourcing and funding requirements to comply with obligations arising from the reforms.



The statutory disregard and costs of purchasing replacement land – where do we stand?

Authors: By Dennis Loether and Monique Lewis

A recent Court decision has narrowed the circumstances in which dispossessed landowners are entitled to compensation for the cost of buying replacement land.

The Court also considered the extent of the "statutory disregard" when determining compensation for the "market value" of the land on the date of its acquisition.

SYDNEY METRO V G&J DRIVAS PTY LTD [2024] NSWCA 5

BACKGROUND

The respondent, G&J Drivas Pty Ltd, owned a large block of land in Parramatta CBD. In 2018, the land was improved by a two-storey mixed-use office/retail complex.

In December 2018, the respondent obtained development consent to erect a 25-storey tower on the land. It had also prepared a further development application to increase the height and GFA of the tower development.

In early 2019 the respondent anticipated the land may be compulsorily acquired for the Sydney Metro project. To mitigate financial risks, it decided to reduce expenditure on the tower, halting the preparation of detailed drawings for the further development application.

Upon the respondent being formally notified that the land would be acquired for the Sydney Metro West project, the respondent ceased development of the tower altogether.

In the first instance, Justice Duggan assessed the market value of the land by assuming the improvements permitted by the two development applications had been undertaken. Justice Duggan held that, but for the compulsory acquisition, the respondent would not have ceased development work, and therefore the loss in value, compared to if those improvements had been made, was to be disregarded under section 56(1)(a) of the *Land Acquisition (Just Terms Compensation) Act 1991* (NSW) (**the Act**).

Sydney Metro appealed the Court's findings. On appeal, the Court of Appeal was required to consider the following two issues:

- statutory disregard under section 56(1)(a) of the Act to the assessment of market value
- Section 59(1)(d), (e) and f) of the Act for claims for stamp duty and other expenses in the purchase of replacement land

ISSUE ONE: STATUTORY DISREGARD

The respondent argued that the land should be valued based on the tower development approved by the development application and the further development application for the increased height and FSR. The respondent sought to uphold Justice Duggan's finding that, but for the compulsory acquisition, it would have continued with the development.

The respondent argued that section 56(1)(a) of the Act required the decision to discontinue development to be disregarded when assessing the land's market value.

The Court of Appeal, however, held that the respondent's claimed loss in market value was not caused by Sydney Metro's actual or proposed carrying out of the public purpose. Rather, the loss was caused by the respondent's decision to stop development, which was based on the anticipated acquisition of the land.

The Court held that the cause of any increase or decrease in the value of the land is best determined by focusing on the effects of the proposed public purpose, not the effects of the proposed acquisition.

Any change in the value of the land caused by the owner's choices before its acquisition (for example, choices based on the possibility of the land being acquired) are not regarded as having been caused by the proposed public purpose (whether it is actually carried out or not).

The Court held that the nature of the public works for which the land was being acquired was not relevant to the respondent's decision to stop development. On this basis, no casual connection existed between the public works and the increase or decrease in the value of the land.

The Court reached this conclusion despite the respondent providing geotechnical reports prepared for the proposed works that made it clear to the respondent that the land would be acquired for the public purpose.

The Court's decision emphasises that the causal question needs to be answered by the effects of the public purpose on the value of the land,

rather than the effects of its proposed acquisition. It appears the Court considers that whether the public purpose has had any effect on the value of the land can only be determined after the formal notice of acquisition, as until then no connection exits between the public works and the value of the land.

In reaching this decision, the Court emphasised the purpose of the Act being "to ensure compensation on just terms". In this instance, if the Court disregarded the respondent's decision to stop development, the respondent would have received compensation for the market value of the hypothetical improvements to the land without spending anything on those improvements.

ISSUE TWO: STAMP DUTY

The Court has previously held that the entitlement to compensation for stamp duty and mortgage costs under section 59(1)(d) or (e) of the Act is not available to property investors or developers, as they generally do not occupy the land being compulsorily acquired and will not therefore relocate.

In response, developers and investors have claimed those costs under section 59(1)(f) as "any other financial costs". In this, they rely on *Blacktown City Council v Fitzpatrick [2001] NSWCA 259*. The Court of Appeal's decision in this case has narrowed this option.

The respondent sought to claim the costs of purchasing a replacement property, including stamp duty costs, under section 59(1)(f) of the Act, by relying on the Fitzpatrick decision, and given its status as a property developer (who acquires and develops property), the land should be classified as "stock in trade".

However, the Court found that as the respondent did not "relocate", its claim for compensation for stamp duty and other property replacement costs could not be upheld.

In so doing, the Court relied on a previous decision in *Roads and Maritime Services (NSW) v United Petroleum Pty Ltd* (2019) 99 NSWLR 279, which held that "any other financial costs" covered by section 59(1)(f) must be interpreted to be to add something to what is covered by sections 59(1)(a)-(e), and must be construed "purposively" and within context so as to not "subvert the limitations" contained in sections 59(1)(a)-(e).

The Court also held that the Fitzpatrick decision was primarily directed at whether a business carried out on land was an "actual use" for the purpose of section 59(1)(f) and did not consider whether stamp duty is claimable under section 59(1)(f). While the Court did not overturn Fitzpatrick, it has narrowed the circumstances under which property investors and developers may claim the stamp duty costs of relocation property in compensation.

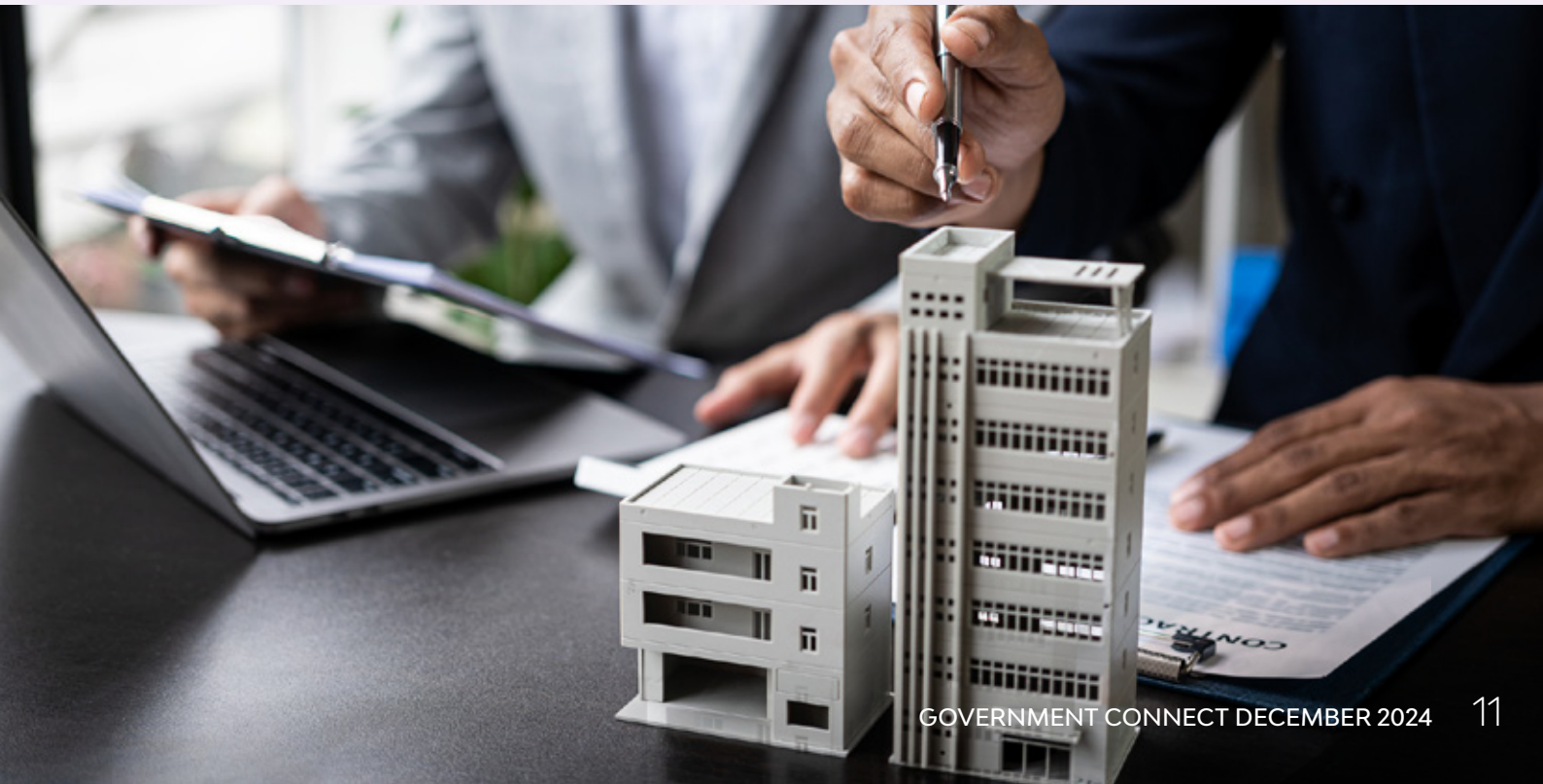
FURTHER DEVELOPMENTS

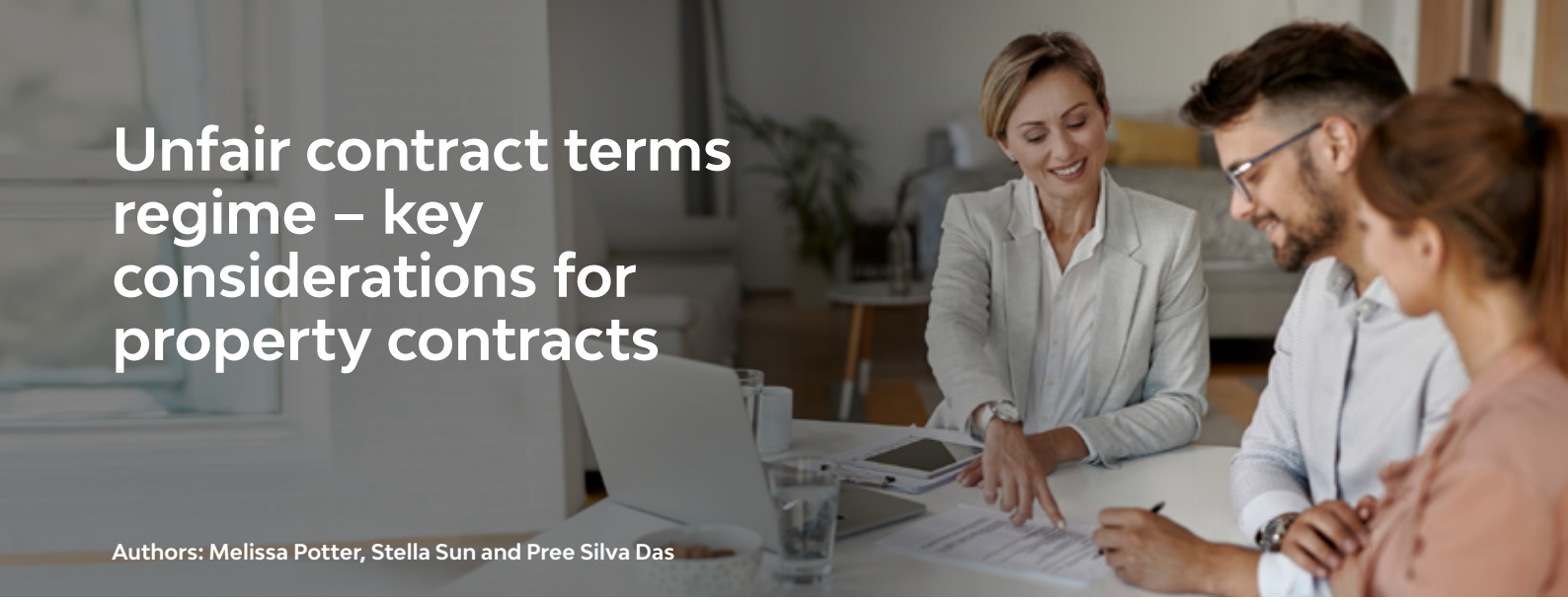
G&J Drivas filed an application seeking special leave to appeal the orders relating to the statutory disregard (not the stamp duty compensation costs) to the High Court. On 6 June 2024, the High Court refused special leave, confirming the Court of Appeal's decision.

CONCLUSION

The Drivas decision is important to property investors and developers. It highlights the danger they face if they decide not to pursue development of their land, even where it is likely or certain that the land will be acquired for a public purpose.

The findings also present new obstacles to property investors and developers seeking to rely on the principles of Fitzpatrick to claim compensation for costs of purchasing replacement property.





Unfair contract terms regime – key considerations for property contracts

Authors: Melissa Potter, Stella Sun and Pree Silva Das

The Unfair Contract Terms Regime (UCT Regime) applies widely across contracts, including property-related agreements. As government entities often manage extensive property portfolios, understanding and applying the UCT Regime is essential to maintaining fair, compliant, and sustainable relationships in contracts such as:

- land sales contracts
- retail and commercial property leases or licences
- residential tenancy or accommodation agreements
- property easements and covenants.

Ensuring that contracts are fair and balanced is vital not only for compliance with the UCT Regime, but also for promoting public trust and transparency.

TERMS IN PROPERTY CONTRACTS THAT MAY BE CONSIDERED UNFAIR

In the recent case of *Castronova v T Jung [2024] NTSC 55*, the Court confirmed that clauses should be written in plain, easily understood language.

The Court further determined that for the purposes of the UCT Regime, fairness and unfairness is assessed by the criteria in section 24 of the Australian Consumer Law (Sch 2, *Competition and Consumer Act 2010* (Cth)), rather than by subjective or moral perspectives.

A term is generally considered unfair if it:

- causes a significant imbalance in parties' rights and obligations
- is not reasonably necessary to protect the legitimate interests of the benefiting party
- is detrimental (financially or otherwise) to the other party.

While each contract and term must be evaluated individually on a case-by-case basis, the following are examples of terms which may be considered unfair under the UCT Regime:

- **Land Sale Contracts**
  - clauses allowing unilateral changes by the vendor, especially when they have significant impact without clear notification
  - termination clauses that allow the vendor, but not the purchaser, to terminate the contract without cause
  - interest clauses for late completion where the interest rate is excessive and operates as a penalty rather than a genuine pre-estimate of a party's loss
  - penalty clauses that apply to one party only in cases of breach or termination
  - terms enabling the vendor to unilaterally extend due dates or other critical deadlines.
- **Commercial Leases or Licenses**
  - ratchet clauses (that is, clauses preventing rent from decreasing after a review), especially as this is already prohibited in retail leasing legislation in multiple states and territories
  - automatic renewal clauses that extend leases or licenses without reassessment or tenant consent
  - termination-for-convenience clauses which allow the landlord to terminate the lease without a clear reason or without reasonable advance notice
  - clauses that allow landlords to terminate the lease for tenant breach without providing adequate opportunity for remedy
  - unlimited indemnity clauses requiring tenants to indemnify the landlord broadly, including for losses outside the tenant's control or resulting from the landlord's own negligence. Limiting indemnity to specific premises or tenant actions is recommended, and "carve-out" clauses are encouraged to ensure landlord accountability.
  - clauses enabling the landlord to claim tenant property without notice, such as when tenants leave items behind at the end of a lease.

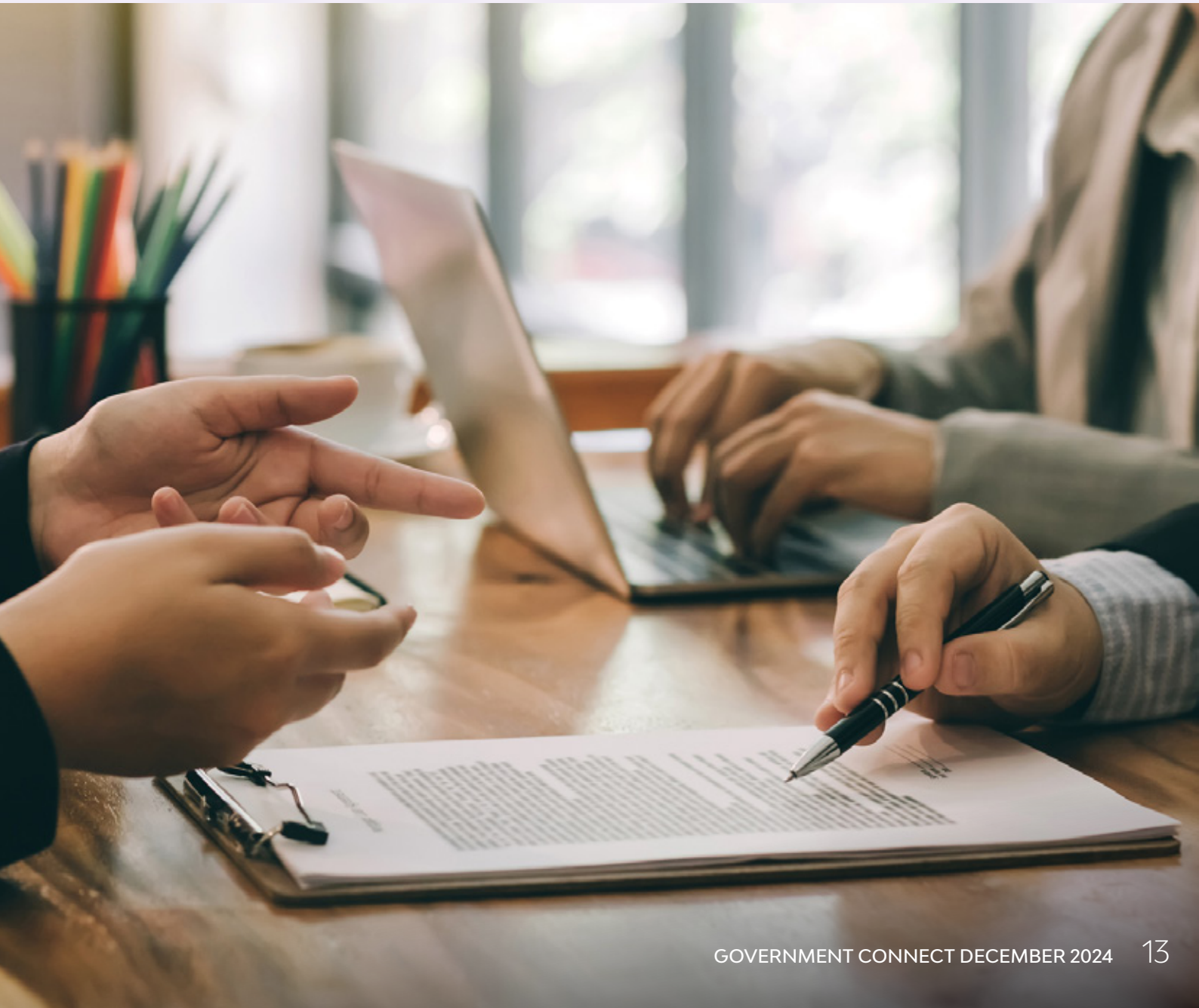
Many of these terms are already restricted by legislation like the *Retail Leases Act 1994 (NSW)*, but government entities should still carefully assess new and existing contracts for alignment with UCT Regime standards.

IMPLEMENTING FAIR AND COMPLIANT CONTRACTING PRACTICES

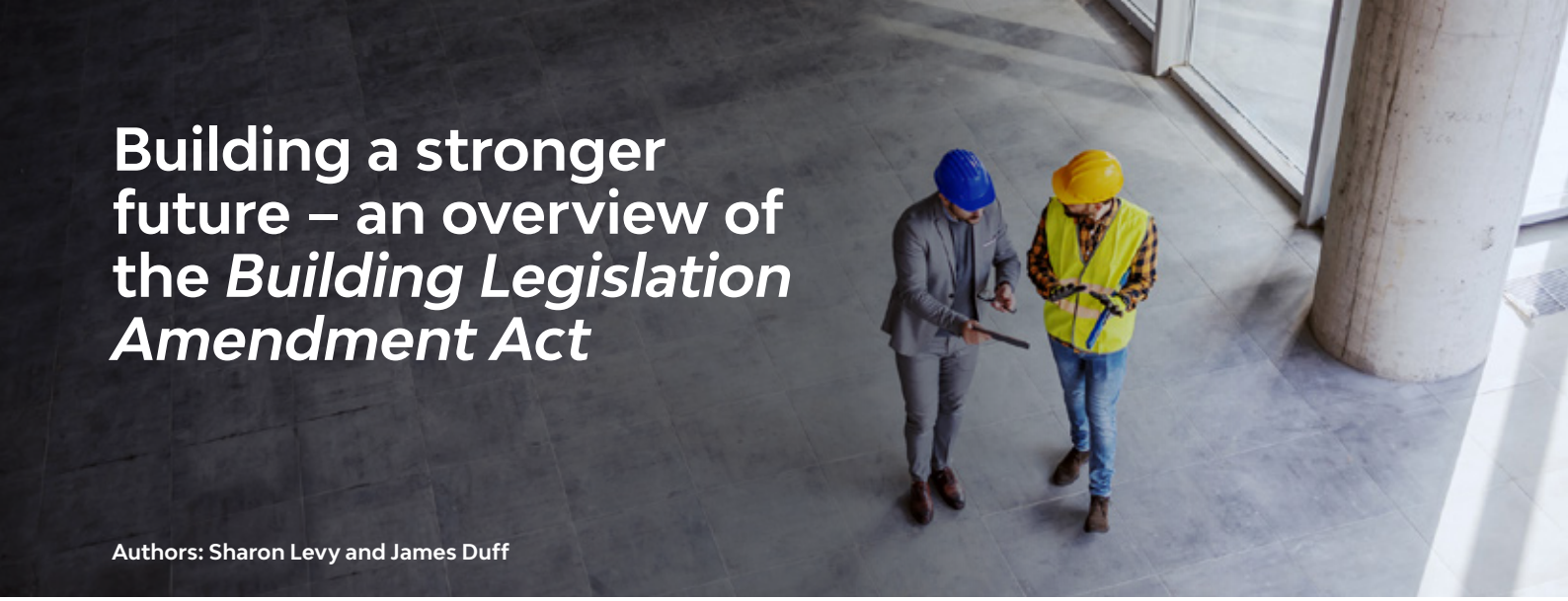
To meet UCT Regime requirements, government entities should adopt practices that reinforce fairness, transparency, and compliance. They include:

1. **Comprehensive reviews of contract precedents:** Regularly review contract templates and assess the general drafting and language of each clause for fairness and transparency. Modify terms that could be considered one-sided or restrictive to the other party.
2. **Facilitate negotiation opportunities**: Present the contract as a starting point, rather than a final offer, to allow for negotiation. Keep records of discussions to demonstrate a collaborative and open approach.
3. **Promote balanced negotiation practices:** Reflect fair-dealing principles by considering both parties' interests and fostering reasonable, transparent agreements.
4. **Consider transitioning tenants to updated contracts on renewal:** When a lease or agreement is due for renewal, consider updating tenants to revised agreements that exclude potentially unfair terms, rather than renewing the contract on the same terms.

By ensuring contracts meet the requirements of the UCT Regime, government entities can reduce compliance risks, support transparency, and build trust with contracting parties. These measures strengthen long-term relationships and encourage sustainable contracting practices that align with the interests of public bodies and their tenants or purchasers.



Building a stronger future – an overview of the *Building Legislation Amendment Act*



Authors: Sharon Levy and James Duff

The *Building Legislation Amendment Act 2023* reflects the NSW Government's commitment to transforming the building and construction industry. It is the latest in a series of initiatives that address building quality, safety, and consumer protection.

To improve accountability and responsibility, the Act amends several key pieces of building legislation, including:

- *Home Building Act 1989* (NSW)
- *Building Products (Safety) Act 2017* (NSW)
- *Design and Building Practitioners Act 2020* (NSW) (**DBP Act**)
- *Strata Schemes Management Act 2015* (NSW)
- *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* (NSW) (**RAB Act**).

As well as addressing gaps, the Act expands the powers of government agencies such as the new Building Commission.

It builds on the success of stronger regulation of class 2 buildings, which typically includes apartment blocks. In particular, it extends the powers of government agencies to oversee and compel compliance in class 1 buildings, including residential homes.

In this article, we provide a summary of what NSW government agencies need to know about the legislation changes.

EXPANDED POWERS UNDER THE *HOME BUILDING ACT 1989*

The Act introduces several new sections into the *Home Building Act* (which regulates residential building) that are substantially similar to the DBP and RAB Acts.

Key new sections include:

1. Section 49A: the Building Commission can authorise an inspector to investigate residential building work. This means the Commission can enter a residential home where works are underway to assess those works.
2. Section 49B(1): the Building Commission can give a rectification order to a contractor requiring them to take certain steps to ensure a defect is rectified.
3. Section 129: the regulator may issue a stop work order on residential works.

Before the Act, the power to investigate and compel a residential builder to rectify works in residential homes was substantially limited, often leading to expensive litigation after work was completed. The expanded powers will allow the Building Commission to proactively investigate defects and have them rectified early, reducing the need for later litigation.

CASE STUDY – RECTIFICATION ORDERS AND THE COURTS

A recent case dealing with the interaction between court proceedings and rectification orders under the RAB Act may challenge the "proactive intervention" narrative.

In *Strata Plan 99576 v Central Construct Pty Ltd* [2023] NSWSC 212 a builder applied for a stay on court proceedings for damages where the works in question were also the subject of a rectification order issued under section 33 of the RAB Act.

The relevant facts are:

- the builder undertook works on a strata development
- the plaintiff was an owners corporation who sued in the Supreme Court seeking compensation for building works which it said were defective
- after proceedings began, the owners corporation lodged a complaint with the Department of Fair Trading requesting assistance
- Project Intervene, an initiative of the Building Commissioner, was investigating the defects but no building work rectification order under section 33 of the RAB Act had yet been issued
- the builder sought to stay the Supreme Court proceedings, including on the basis that,

  "all of the allegedly defective work the subject of the proceedings may be rectified either by the defendants pursuant to a building work rectification order (or pursuant to an undertaking given), or otherwise by the Secretary pursuant to s 42…"

- Outcome: the Court rejected the application and refused to grant a stay.

As more cases are heard, we expect to receive further guidance as to the interplay between the new powers of the Building Commission and the Court. For now, it is uncertain what attitude courts will take to rectification orders while proceedings are under way for the same or similar defects.

Building Products Safety Act – everyone on the supply chain is accountable

Perhaps the most intriguing changes made by the *Building Legislation Amendment Act* are to the *Building Products (Safety) Act 2017* (NSW).

That Act allows the regulator to declare a building product a safety risk and ban its use in building work. It also gives the regulator powers to investigate and issue building product rectification orders.

The most notable product ban is on aluminium composite panels (**ACPs**) for external cladding.

The amendments require everyone in the supply chain of building products to ensure the building products they design, manufacture, deal with, sell or install are suitable for their intended use.

Key duties include:

1. To ensure that a "non-compliance risk" does not exist in relation to a product
2. To provide information in relation to building products
3. To notify of non-compliances or safety risks
4. Various duties in relation to a product recall.

A "non-compliance risk" will exist if:

1. The product is or may be non-conforming – including if it does not comply with the National Construction Code (**NCC**); or
2. An intended use of the product in a building is or may be a non-compliant use – including if the "use" of the building product does not comply with the NCC.

AMENDMENTS TO THE SBBIS & DECENNIAL LIABILITY INSURANCE

Strata Building Bond and Inspection Scheme

The Strata Building Bond and Inspection Scheme (**SBBIS**) requires the developer on some new strata builds to pay a bond on account of any defects that arise after building is completed.

The Act increases the bond (which is held by NSW Fair Trading) from two percent of the price payable on all contracts for the build, to three percent. The increase is necessary given the rapid rise in building costs and increased risk of insolvency in the construction industry.

The implementation of this change has been deferred until 1 July 2025.

Decennial Liability Insurance

As an alternative to the developer's bond, a developer may seek approval from the regulator to obtain decennial liability insurance (**DLI**) for building works. DLI is a policy which:

- is taken out by a developer of a strata scheme in favour of an owners corporation
- insures against serous defects in the building elements of common property for 10 years and on a strict liability basis (see Division 3AA in the Strata Schemes Management Act 2015 (NSW).

DLI is a new form of protection for strata schemes intended to cover the cost to fix serious defects in critical building elements, including structural elements, fire safety systems and waterproofing.

The extent and value of the insurance coverage makes DLI a viable alternative to the SBBIS. However, its utility is yet to be assessed in practice. The NSW Government considers it may be necessary to make DLI mandatory after a transition period and maintains that a developer should be required to remediate defects in the first instance.

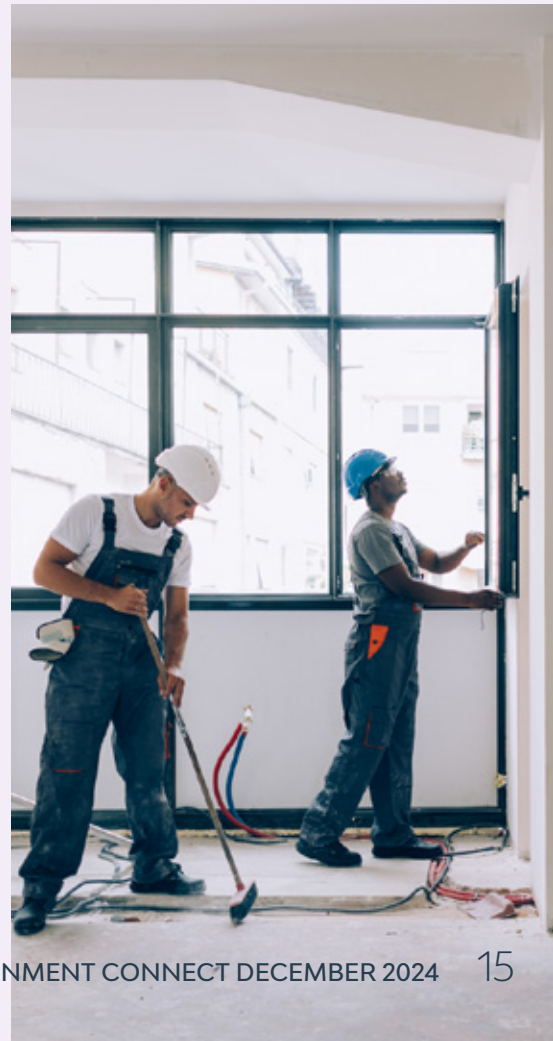
ANTI-PHOENIXING LAWS

Another significant amendment to the *Home Building Act* is the introduction of anti-phoenixing laws for contractors.

Phoenixing is sometimes used by a business owner to avoid completing work, remediating defects or paying outstanding debts. The Act aims to prevent phoenixing by allowing the Building Commission to refuse an application, cancel a licence or disqualify a person from holding a contractor licence if they have been involved in the management of a company which has become insolvent in the last 10 years.

CONCLUSION

The *Building Legislation Amendment Act 2023* supports the NSW Government's commitment to improving building quality, safety, and consumer protection through enhanced regulatory powers and responsibilities. These amendments are a significant step toward greater accountability in the construction industry, addressing critical gaps while supporting proactive oversight and defect rectification.



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

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- Enforcement, regulation and prosecution

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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 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.

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

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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 140 lawyers, we offer personalised legal services delivered within the following divisional practice areas:

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