GOVERNMENT CONNECT

Corporate & Commercial and Dispute Resolution & Advisory

Bartier Perry LAWYERS

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INTRODUCTION

Welcome to our May 2024 Government Connect.

As the next in our series of area-specific publications, this issue will focus on disputes and the corporate aspects of the work you do.

Our authors discuss key legal and regulatory developments shaping governance and decision-making in New South Wales. We tackle a range of issues facing our clients, from navigating the complexities of legislation in the construction industry through to examining the nuances of legal obligations in commercial contracts. We explore the implications of the High Court's recent decision on institutional abuse as well as the new mandatory notification scheme for data breaches in the NSW public sector.

As lawyers we find these topics interesting and enjoy sharing insights about changes in the legal landscape. We hope you will also find these updates of interest and of value.

Warm regards,
David Creais

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Good faith and reasonable endeavours in commercial contracts – important obligations, if not always 100% clear what each involves

Author: Rebecca Hegarty

It is common for commercial contracts to impose an obligation of good faith, a use of reasonable endeavours or a use of best endeavours. Government agencies are also encouraged to use good faith in trying to resolve disputes.

So, what do these phrases mean and what is the law on such obligations being imposed in a commercial contract?

AM I REQUIRED TO ACT IN GOOD FAITH?

An obligation to act 'in good faith' can arise by an express term in a contract. For example, a dispute resolution clause may require the parties to negotiate in good faith. Similarly, a termination for convenience clause may require a party to act in good faith, with the terminating party required to give reasonable notice and the other party required to mitigate its loss arising from the termination.

It has also been argued that there is an obligation to act in good faith implied in all commercial contracts. This raises the question – what does acting in good faith mean?

THE GOOD FAITH OBLIGATION - WHAT DOES IT ACTUALLY MEAN?

In *Paciocco v ANZ Banking Group Ltd* [2015] FCAFC 50 we see the contractual obligation to act in good faith described as an obligation to:

- act honestly
- act with fidelity to the bargain (that is, carry out what each party was obliged to do under the agreement)
- not act to undermine the bargain entered or the substance of the contractual benefit bargained for
- act reasonably and with fair dealing, having regard to the interests of the parties
- act in line with the provisions, aims and purposes of the contract, objectively ascertained.

Whether a party has acted in good faith will require an examination of their conduct and will be determined on the facts of each case. It could be argued that this could be established by pointing to evidence which demonstrates how a party did not act in good faith.

EXTENT OF THE DUTY

The extent of the duty is demonstrated in *Macquarie International Health Clinic Pty Ltd v Sydney South West Area Health Service*. In this case, Macquarie and Sydney South West Area Health Service (SSW Area Health) signed a heads of agreement to develop a private hospital on land within the Royal Prince Alfred Hospital precinct owned by SSW Area Health. Leases were granted to Macquarie over the site for the intended hospital. The heads of agreement, and a number of the agreements, required both parties to act in 'utmost' good faith. It was critical for Macquarie that the proposed hospital was located within the Royal Prince Alfred Hospital precinct.

SSW Area Health created an asset strategic plan which was inconsistent with the location of the proposed private hospital. This was not revealed to Macquarie when it was preparing its construction and design plans. The Court of Appeal found that the obligation to act in good faith was enforceable and required SWW Area Health to disclose the departures to Macquarie, as that failure would have changed Macquarie's expectations of the agreement. The Court found that the duty did not mean the parties had to ignore their own interests, but they were required to co-operate reasonably to carry out what was required under the contract.

The High Court has not ruled on the precise meaning and extent of the duty of good faith and, until it does, we are guided by the case law on the facts of each case.

IS A DUTY OF GOOD FAITH *REALLY* IMPLIED IN ALL COMMERCIAL CONTRACTS? THE ANSWER'S NOT CLEAR.

The existence and extent of an implied obligation of good faith in the performance of a contract is not yet settled in Australia. In *Royal Botanic Gardens and Domain Trust v South Sydney City Council*, the High Court commented that it was an important issue but not appropriate to be considered in that case. The Court noted, however, that in argument, both parties accepted that such an obligation existed in the lessor's determination of rent.

Different approaches have been taken as to whether an obligation to act in good faith is implied in the performance of a contract. In New South Wales, the Court of Appeal has considered it appropriate to imply the

obligation into commercial contracts generally. For example, in *Cordon Investments Pty Ltd v Lesdor Properties Pty Ltd*, which involved a construction contract dispute, it was deemed appropriate to imply a good faith obligation, noting this was consistent with the approach taken in a number of decisions in that Court.

The Victorian Court of Appeal took a different view, indicating that the good faith obligation should not be implied in all commercial contracts and that,

> *"It may, however, be appropriate in a particular case to import such an obligation to protect a vulnerable party from exploitive conduct which subverts the original purpose for which the contract was made."*

BEST ENDEAVOURS V REASONABLE ENDEAVOURS – WHAT'S THE DIFFERENCE?

If there is doubt whether a party can achieve something because it is not completely within its control, that party will be reluctant to provide an absolute assurance that it will be done. That is where a 'best endeavours' or 'reasonable endeavours' qualification may assist.

Both these terms will consider what is reasonable in the circumstances. However, it can be taken that 'best endeavours' imposes a higher standard to do everything reasonably possible to achieve an outcome. 'Reasonable endeavours', on the other hand, would be steps that a reasonable person in that situation would take to achieve the outcome.

In *Electricity Generation Corporation v Woodside Energy Ltd* the High Court considered a contract between the parties for the supply of gas. The contract required Woodside to supply a maximum daily quantity of gas and to use 'reasonable endeavours' to supply an additional maximum daily quantity at a set price. For the additional supply, Woodside had the right to *"take into account all relevant commercial, economic and operational matters"* in determining if it could supply. This provided a guide or internal standard in determining whether Woodside had breached its reasonable endeavours obligation. The High Court, in finding no breach of this obligation by Woodside, made three observations about the use 'reasonable endeavors':

- the obligation qualified by these words is not absolute or unconditional
- the obligation will be considered against what is reasonable in the circumstances, including how it will affect that party's business
- some contracts will have an internal standard of what is reasonable which may be related to their business interests.

The key to understanding how endeavours may be interpreted and the steps to be taken to avoid breaching such a clause lies in contractual interpretation and whether the contract itself provides further assistance in that interpretation. Drafting factors that can be taken into account, for example, may be helpful.

KEY TAKEAWAYS

When NSW Government agencies are entering into commercial contracts with third parties, it is important to understand what outcomes are expected and whether the obligations imposed on either party are absolute or conditional. Reasonableness and good faith will be interpreted by what the contract provides and what is reasonable in the circumstances. Neither dictate, however, that a party's own interests should be completely disregarded.

Legislators up the stakes on privacy with new, mandatory scheme for NSW public sector agencies

Authors: Rebecca Hegarty, Robert Lee and Juan Roldan

Given the recent surge in cyberattacks and data breaches, NSW public sector agencies (as defined under the *Privacy and Personal Information Protection Act 1998* (NSW) (PPIP Act) and hereon referred to as 'agencies') must be more proactive than ever about their cybersecurity and data-handling practices.

Not only are attacks becoming more frequent, but according to a recent Australian Cyber Security Centre report, last year the average cost of each reported cyber crime rose by 14 per cent.

NSW legislators have taken note. In November last year, the Mandatory Notification of Data Breach (**MNDB**) scheme commenced, replacing the previous scheme, which was merely voluntary. The changes have been enacted under amendments to the PPIP Act.

Amendments include:

- a new MNDB scheme that requires agencies to notify the Information and Privacy Commissioner (**IPC**) and affected individuals of eligible data breaches that are likely to result in serious harm to the affected person
- exemptions from mandatory notification in certain circumstances
- giving the IPC power to investigate, monitor, audit and report on agencies regarding the mandatory notification of data breaches
- requiring agencies to publish a data breach policy and keep a data breach register.

NEW OBLIGATIONS FOR AGENCIES

Under the MNDB scheme agencies must now:

- immediately make all reasonable efforts to contain a data breach
- undertake an assessment within 30 days where there are reasonable grounds to suspect there may have been an eligible data breach
- during the assessment period, make all reasonable attempts to mitigate the harm caused by the suspected breach
- decide whether a breach is an eligible data breach or there are reasonable grounds to believe it is
- notify the IPC and affected individuals of the eligible data breach
- comply with other data management requirements.

TO WHOM DOES THE PPIP ACT APPLY?

Under the PPIP Act, agencies include NSW government agencies, statutory authorities, universities, NSW local councils, and other bodies whose accounts are subject to the Auditor General.

The NSW Information and Privacy Commission (IPC) administers the PPIP Act and the *Health Records and Information Privacy Act 2002 (NSW)*.

THE INFORMATION PROTECTION PRINCIPLES (IPPS)

The PPIP Act contains 12 IPPs that describe what NSW agencies must do when handling personal information (including how it must be collected, stored, used and disclosed) and a person's rights to access their own information.

The IPC has also created a Data Breach Self-assessment Tool for MNDB, and a Data Breach Notification to the Privacy Commissioner form, each of which provide guidance on identifying and notifying the IPC of an eligible data breach.

Agencies that collect tax file numbers have additional obligations under the Commonwealth Notifiable Data Breaches scheme established by the *Privacy Act 1988* (Cth), where a data breach occurs involving TFNs.

WHAT IS PERSONAL INFORMATION?

Section 4(1) of the PPIP Act defines personal information as:

> *'information or an opinion (including information or an opinion forming part of a database and whether or not in a recorded form) about an individual whose identity is apparent or can be reasonably ascertained from the information or opinion.'*

Personal information includes things such as an individual's fingerprints, retina prints, body samples or genetic characteristics. It also includes information, or an opinion, that could identify an individual.

For example, their name, address, date of birth, gender or audio-visual material.

Personal information does not include any of the types of information listed under section 4(3) for example, information about:

- an individual who has been dead for more than 30 years
- an individual that is contained in a publicly available publication
- an individual arising out of a Royal Commission or Special Commission of Inquiry.

PENALTIES

While there are no monetary penalties for non-compliance with the MNDB scheme, reputational damage remains an important consideration.

What's more, individuals affected by an agency's conduct may seek review of that conduct under Part 5 of the PPIP Act. Even if the agency takes remedial action, the individual may still apply to the NSW Civil and Administrative Tribunal for administrative review. The tribunal may order the Agency to pay the individual up to $40,000 for loss or damage suffered.

HOW TO REMAIN COMPLIANT

The IPC says agencies should take these actions as a matter of course:

- clearly define roles and responsibilities for the management of actual or suspected data breaches
- ensure the Privacy Management Plan complies with new section 33(2)(c1), which requires provisions for complying with Part 6A of the PPIP Act, specifically the mandatory notification of data breach scheme. (Note: the plan should reference the agency's data breach policy)
- develop and publish a data breach policy in accordance with section 59ZD, outlining the agency's response to a data breach (commonly called a Data Breach Response Plan)
- revise relevant policies and procedures to align with obligations under the MNDB scheme
- establish and maintain an internal register of eligible data breaches in accordance with section 59ZE, recording the information specified under section 59ZE(2). Note: this should include, where practicable, for all eligible data breaches –
  - who was notified of the breach
  - when the breach was notified
  - the type of breach
  - details of steps taken by the agency to mitigate harm done by the breach
  - details of the actions taken to prevent future breaches
  - the estimated cost of the breach
- maintain a public notification register of any notifications made under section 59N(2). Information in the register must be publicly available for at least 12 months after publication and include the information specified under section 59O).

Agencies should also update agreements with contractors to include suitable provisions regarding data breach notification and management. Combined with training to upskill staff, this will help establish clear lines of responsibility and accountability.

REPORTING A CYBERCRIME, INCIDENT OR VULNERABILITY

Aside from the new requirements, agencies can report cyber security events or vulnerabilities to the police and/or the Australian Signal's Directorate's Australian Cyber Security Centre.

ESG updates – perfection not expected, but continuous improvement is

Authors: Samantha Pacchiarotta, Eric Kwan and Rebecca Hegarty

The Environmental, Social and Governance (ESG) space has seen several significant developments over the past year. NSW has seen guidance on modern slavery reporting further refined, signalling the importance of this issue, especially for government agencies. We've also seen huge strides towards developing a universally recognised and consistent international framework on ESG reporting. Within Australia, the focus on greenwashing (particularly in financial products) has never been more front of mind for regulators.

This article summarises key ESG updates impacting government agencies.

A QUICK REFRESHER – ESG FROM A GOVERNMENT LENS

ESG factors play a crucial role in evaluating sustainability efforts. When applied to government agencies, ESG encompasses:

- *Social factors* - How a government body engages with its employees and communities. Key aspects include employee rights, work health and safety measures, diversity initiatives, education, human rights and supply chain standards and resilience.
- *Environmental factors* - A government body's environmental impact, including contributions to climate change through greenhouse gas emissions, waste management practices, energy efficiency, biodiversity preservation and the management of natural capital.
- *Governance factors* - The stability and effectiveness of a government body's internal system. It encompasses institutional strength, transparency and accountability within the public service.

SOCIAL FACTORS - NEW GUIDANCE ON MODERN SLAVERY REPORTING

Recent years have seen notable developments in the social category, with the introduction of modern slavery laws at the federal and state levels.

Under section 178 of the *Public Works and Procurement Act 1912* (NSW), NSW Government agencies have been required to:

- take reasonable steps to ensure that goods and services they procure are not the product of modern slavery within the meaning of the *Modern Slavery Act 2018* (NSW) defined in section 5; and
- report on those steps.

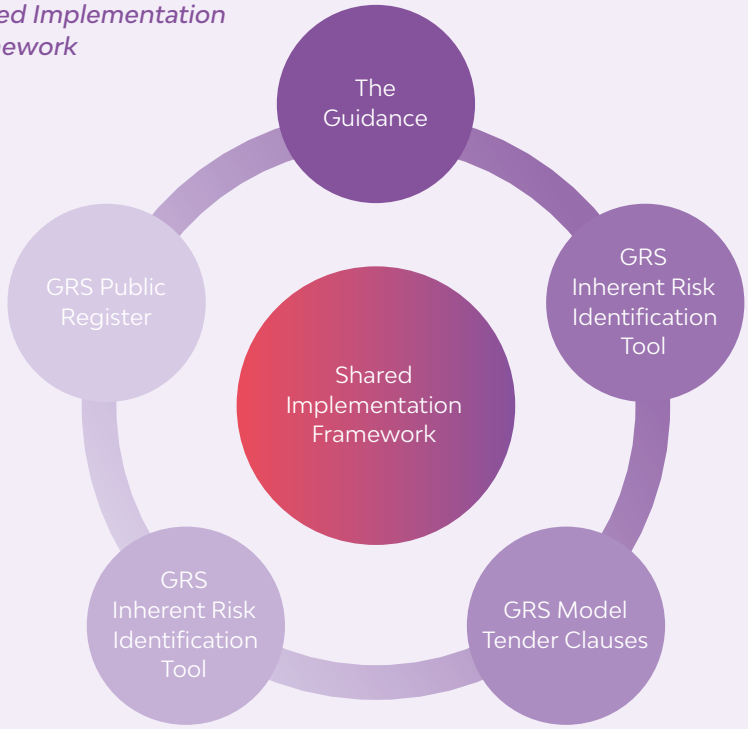
More than 400 NSW Government agencies, state owned corporations and other government bodies are impacted by these requirements. To help them meet their obligations, in late 2023 the NSW Anti-Slavery Commissioner published the Guidance on Reasonable Steps to Manage Modern Slavery Risk in Operations and Supply-Chains (**Guidance**). The Guidance is the centrepiece of the Anti-Slavery Commissioner's Shared Implementation Framework. Public entities are expected to align their procurement policy framework to reflect the Guidance and to consider the Guidance and the broader Shared Implementation Framework when exercising their functions.

How does the Guidance assist government agencies in undertaking modern slavery reporting?

The Guidance explains how to prevent, identify, mitigate, address and remediate modern slavery risks. It also outlines the fundamental principles that government agencies must grasp in order to fulfil their reporting and due diligence obligations under NSW law.

The Guidance is intended to be used in conjunction with the other resources available under the Shared Implementation Framework, as illustrated on the following page:

Shared Implementation Framework



The Anti-Slavery Commissioner has acknowledged it will take time for entities to fully conform with the Guidance. Nevertheless, public entities are expected to show continuous improvement in their modern slavery reporting efforts.

ENVIRONMENTAL FACTORS – INTERNATIONAL DEVELOPMENTS IN ESG REPORTING CATCHING ATTENTION IN AUSTRALIA

Government agencies face mounting pressure to enhance transparency, including in respect of their sustainability efforts. Financial reporting standards are evolving to mandate disclosure of climate and other sustainability risks, along with evidence of actionable steps to meet goals. Investors and the community increasingly seek a unified whole-of-government approach to ESG matters.

Challenges faced by government in sustainability reporting

Government agencies and the public sector lack comprehensive and consistent guidance on sustainability reporting. The reporting process is frequently labour intensive and expensive. Although several reporting frameworks exist for the private sector, they do not address the intricacies unique to the public sector. Moreover, the multitude of frameworks can create uncertainty for government agencies and their stakeholders.

Amid growing concerns about greenwashing, the government's role has come under question: should it simply oversee and establish legal requirements for uniform reporting standards within the private sector, or should it also transparently disclose its own sustainability impacts?

Looking internationally – the ISSB sustainability standards

Last year saw significant advances in sustainability reporting and disclosure practices. In particular, the International Sustainability Standards Board (ISSB) developed these comprehensive sustainability disclosure standards:

- IFRS S1 – General Requirements for Disclosure of Sustainability-related Financial Information
- IFRS S2 – Climate-related Disclosures

There is a global push for all jurisdictions, including Australia, to adopt a version of the ISSB standards. Draft legislation issued by Commonwealth Treasury provides the mechanics for the implementation of a version of the ISSB standards into the Australian regime.

Looking to the future

As governments strive to create sustainable and inclusive communities, the demand for more reliable sustainability data will keep growing.

It has been argued that governments should produce comprehensive whole-of-government sustainability reports, accompanied by transparent sustainability disclosures at the whole-of-government level.

While the focus of the draft legislation introduced by Commonwealth Treasury is on corporate entities, it could provide a useful reference point for government in developing its own framework for a comprehensive whole-of-government sustainability report.

GREENWASHING AT A GLANCE

Greenwashing occurs when an organisation misrepresents its sustainability-related risks, business credentials, strategies or products or services.

Greenwashing has remained high on the ACCC and ASIC's enforcement priorities over the past few years. This is demonstrated by the ACCC's release of its Guidance for Business of Environmental and Sustainability Claims and ASIC's increased enforcement activities, including issuing of penalties and proceedings against organisations adopting alleged greenwashing practices.

Greenwashing claims can undermine public trust. While it is important that government shows leadership in stamping out greenwashing, it is just as important that sustainability reporting by government is approached with the same care and transparency.

Conflicting interests in the construction industry – a challenge for legislators

Authors: Sharon Levy & James Duff

The building and construction industry attracts notable government intervention to balance varying interests, one of which is the need for consumer confidence and protection.

This article highlights topical challenges confronting government bodies, particularly in NSW. It explores the timeline of legislative and policy initiatives of the NSW Government and how they are playing out in practice.

INSURANCE CRISIS – INTRODUCTION OF THE *CIVIL LIABILITY ACT* IN 2002

Many will recall the "insurance crisis" of the 1990s and early 2000s when insurance premiums increased in response to the level of personal injury litigation. It led to increasing difficulties in obtaining public liability insurance because of cost, or unwillingness to insure high-risk entities.

Part of the government response to address these difficulties was the introduction of the *Civil Liability Act 2002* (Cth) (CLA) which substantially modified the common law of negligence. The CLA altered the principles of the "duty of care" and causation and restricted the recovery of damages from personal injury. The intention was to reduce liability, restore personal responsibility for complainants and create stability for complainants and insurers alike.

The CLA includes proportionate liability provisions which allow liability for loss to be divided among multiple parties based on each party's degree of responsibility. This effectively means a plaintiff needs to bring claims against a number of defendants to recover its loss.

INTERPLAY WITH THE BUILDING & CONSTRUCTION INDUSTRY

The duty of care is not a foreign concept within the building and construction industry. In the 1990s, the High Court released a decision contrary to the long-standing position with respect to the duty of care owed by builders to subsequent purchasers. In the well-known decision of *Bryan v Maloney*, the High Court found that a builder did in fact owe a duty of care in negligence to subsequent owners of a property. That principle, however, was subsequently overturned in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288* which effectively ended the duty of care in negligence for residential building work.

In 2020, the NSW Government interjected through the *Design and Building Practitioners Act 2020* (NSW) (DBP Act). This Act introduced the now well-known statutory duty of care, which is found in section 37, as well as increased regulatory oversight and powers.

In the intervening four years, a large body of dialogue and litigation has ensued in respect of the DBP Act. One interesting area is the interplay between proportionate liability in the CLA and the DBP Act, and whether liability under the DBP Act could be apportioned among multiple parties.

Earlier cases indicated that the proportionate liability provisions did apply to a claim for damages arising from a breach of the duty to exercise reasonable care to avoid economic loss caused by defects under section 37 of the DBP Act. However, the NSW Court of Appeal in *The Owners Strata Plan No 84674 v Pafburn Pty Ltd* has recently confirmed that the proportionate liability regime in the CLA does *not* apply to the statutory duty of care found in the DBP Act.

This means that developers and builders cannot apportion liability to subcontractors or consultants and cannot reduce their liability to a plaintiff by deflecting blame to other parties.

This decision ensures that property owners, including government bodies, will be able to hold parties accountable for economic loss arising from building works. It also upholds the intention of the DBP Act to ensure accountability within the construction industry, which shines through provisions such as section 39, which states that the statutory duty of care cannot be delegated.

On 11 April 2024, however, the High Court of Australia granted special leave to appeal the Court of Appeal's decision, so the state of law in this area remains uncertain.

QUANTITY VERSUS QUALITY?

The NSW Government is also grappling with the need to ensure quality builds while also addressing housing supply and affordability. It has introduced a raft of policies,

plans and legislation in an attempt to secure a supply of housing to meet demand. This has led to concerns about quality and the potential impact on people's confidence in the construction industry.

The DBP Act and *Residential and Apartment Buildings (Compliance and Enforcement) Act 2020* (NSW) (RAB Act) aim to alleviate some of those concerns. From 1 December 2023, the NSW Building Commission took on the role of regulator of the building and construction industry in NSW, with a focus of rebuilding trust and capability in the construction sector and delivering on the NSW Government's housing commitments.

Using powers granted under the RAB Act, the Commission's 'Project Intervene' seeks to ensure serious defects in residential apartment buildings are addressed. One such power is the ability to issue a "building work rectification order". The aim of such orders is to reduce the number of construction disputes that end up before the courts.

DEALING WITH INCREASED LITIGATION OF BUILDING DISPUTES

As we have seen, many government initiatives, including the CLA and RAB Act, attempt to limit expensive and time-consuming litigation in the building and construction space. Nonetheless, there is still a need for appropriate resourcing to deal with disputes between developers, owners and builders.

Presently, the NSW Civil and Administrative Tribunal (NCAT) may hear building claims up to $500,000. Seemingly, the intention is to alleviate pressure on the courts by transferring building claims to NCAT.

Recent decisions have included discussion on whether NCAT has jurisdiction to hear and determine claims under section 37 of the DBP Act. Unlike the *Home Building Act 1989* (NSW) (HBA), which specifically confers jurisdiction to NCAT to hear claims for breaches of the statutory warranties in section 18B of the HBA, no such provision exists in the DBP Act.

In *Deaves v Sigma Group NSW Pty Ltd* claims were brought in NCAT by homeowners against a developer and builder under each of section 18B of the HBA, and section 37 of the DBP Act. The Appeal Panel held that a claim for breach of the statutory duty of care was a "building claim" under section 48K of the HBA, as it concerned a claim for a sum of money which arose *"from a supply of building goods or services"*.

In *McLachlan v Edwards Landscapes Pty Ltd*, the Supreme Court determined that the Local Court was entitled to transfer a proceeding to NCAT which concerned claims under the HBA and DBP Act. With respect to the claim under section 37 of the DBP Act, the Court stated, *"if…the plaintiff's case somehow managed to go beyond the claim for breach of the statutory warranties…then the plaintiff could continue litigating them"* in NCAT.

Each of these authorities appears to suggest that NCAT can determine claims for breach of the statutory warranties under the HBA and claims for breach of the duty of care under the DBP Act. This undoubtedly impacts the landscape of building defect litigation and will influence practical decisions such as where to commence proceedings.

In our experience, NCAT is under increasing strain to address the rising number of building claims coming before it. The pressure on courts and tribunals may be exacerbated by some of the issues discussed in this article, including:

- the rush to supply affordable housing – which *may* be perceived as leading to lower quality workmanship in new builds – the effect of which remains to be seen
- the retrospective operation of the statutory duty of care
- the jurisdiction of NCAT to hear claims for breach of section 37 of the DBP Act.

CONCLUSION

The upshot is that despite government bodies' already active approach in the construction sector, including regulatory oversight and intervention, similar action will be required in the future to ensure and maintain consumer confidence and protection.

A whole new world - High Court rules on permanent stay applications in historical institutional abuse proceedings

Authors: Lian Chami, Gilbert Olzomer and Kate Ralph

Following the final report of the Royal Commission into Institutional Responses to Child Sexual Abuse in December 2017, all states and territories across Australia amended their legislation to allow legal action for damages relating to the death or personal injury of a survivor of child sexual abuse, regardless of when the abuse occurred.

In New South Wales, section 6A of the *Limitation Act 1969* (NSW) was introduced. It reads:

(1) *An action for damages that relates to the death of or personal injury to a person resulting from an act or omission that constitutes child abuse of the person may be brought at any time and is not subject to any limitation period under this Act despite any other provision of this Act.*

Subsection 6A(6) of the *Limitation Act* states that this section does not limit:

(a) *Any inherent jurisdiction, implied jurisdiction, or statutory jurisdiction of a court, or*

(b) *Any other powers of a court arising or derived from the common law or under any other Act (including any Commonwealth Act), rule of court, practice note or practice direction.*

Section 6A further states that *"this section does not limit a court's power to summarily dismiss or permanently stay proceedings where the lapse of time has a burdensome effect on the defendant that is so serious that a fair trial is not possible."*

Under section 67 of the *Civil Procedure Act 2005* (NSW) the court may make orders to stay any proceedings before it, either permanently or for a specified period.

Under section 13.4(1)(c) of the *Uniform Civil Procedure Rules 2005* (NSW) the court may order proceedings to be dismissed if it appears they are an abuse of process of the court.

There has been a noticeable increase recently in the number of defendants seeking a permanent stay of applications on the grounds that the length of time since the alleged abuse makes a fair trial no longer possible.

GLJ V THE TRUSTEES OF THE ROMAN CATHOLIC CHURCH FOR THE DIOCESE OF LISMORE [2023] HCA 32

Procedural history

In 2020, the plaintiff, known as GLJ, commenced proceedings against the Roman Catholic Church for the Diocese of Lismore in the Supreme Court of New South Wales. The proceedings related to a claim for damages for personal injury which GLJ alleged resulted from a priest of the church, Father Anderson, sexually assaulting her in 1968 when she was 14 years old.

Later in 2020, the church filed an application seeking a permanent stay of proceedings under section 67 of the *Civil Procedure Act 2005* (NSW) on the grounds that *"virtually all of the relevant senior persons who could have provided instructions and given evidence in the current proceedings* [including Father Anderson] *ha[d] since died" (GLJ v Trustees of Roman Catholic Church for Diocese of Lismore* [2021] NSWSC 1204 (**First Decision**), [30]).

In 2021, the primary judge dismissed the application on the basis that the church had not *"discharged the onus of demonstrating on the balance of probabilities that the continuance of the proceedings would be unjustifiably oppressive to the defendant or bring the administration of justice into disrepute in a sense that a fair, albeit not perfect, trial can no longer be had"* (First Decision, [41]).

In 2022, the Court of Appeal allowed the appeal and permanently stayed the proceedings on the basis that, by reason of Father Anderson's death, the church did not have a *"meaningful opportunity"* to engage with GLJ's accusations and evidentiary material. It was concluded that there was *"nothing a trial judge could do in the conduct of the trial to relieve against its unfair consequences" (Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78 (**Second Decision**), [122]).

The plaintiff then sought leave to appeal to the High Court of Australia.

THE HIGH COURT DECISION

The High Court found that the decision of whether or not to grant a permanent stay of proceedings on the grounds of an abuse or process was not a discretionary one. Kiefel CJ, Gageler and Jagot JJ stated *"Proceedings either are or are not capable of being the subject of a fair trial or are or are not so unfairly and unjustifiably oppressive as to constitute an abuse of process"* (GLJ, [15]).

In applying this "correctness standard", the High Court found (in a 3:2) majority that the appeal should be granted, that the church did not satisfactorily prove that there could be no fair trial, and that the church therefore did not prove that the proceedings involved an abuse of process.

Principles of Moubarak

All judges agreed that the reasons considered in the decision of *Moubarak (by his tutor Coorey) v Holt* (2019) 100 NSWLR 218 (***Moubarak***) applied to considerations of a permanent stay of proceedings. The reasons were:

1. The complainant had never confronted the defendant with the allegation of sexual assault before the onset of the defendant's dementia.
2. The defendant had advanced dementia prior to the report of the alleged assaults to the police.
3. The defendant had advanced dementia at the commencement of proceedings.
4. There were no eyewitnesses to the alleged assaults.
5. Because of his dementia, the defendant could not give instructions.
6. Because of his dementia, the defendant would have been also "utterly unable" to give evidence in the proceedings.
7. Because of his dementia, the defendant would have been unable to give instructions *"during the course of the trial."*
8. The events took place 45 years ago and *"other potentially relevant witnesses are now dead or unavailable."*
9. There was no credible suggestion that some documentary evidence may be in existence that would bear upon the likelihood or otherwise of the alleged sexual assaults having occurred.

Kiefel CJ, Gageler and Jagot JJ noted that in *Moubarak*, the defendant was the alleged perpetrator of the abuse. In *GLJ* and other historical institutional abuse cases, the alleged perpetrator of the abuse is generally not listed as a defendant. The alleged perpetrator is therefore not required to give instructions in relation to the proceedings.

The judges also noted that unlike in *Moubarak*, the church had been on notice of Father Anderson's alleged pattern of sexually abusing boys well before his death and had had an opportunity to *"fully inform itself about the extent of Father Anderson's alleged crimes any time before his death"* (GLJ, [79]).

Public interest considerations

Kiefel CJ, Gageler and Jagot JJ placed great significance on the legislative intent of removing the limitation period for survivors of child sexual abuse. The judges stated *"Parliament acted to ensure that people within that class may commence proceedings at any time. Parliament thereby imposed its own normative requirements on proceedings within this class. Judicial fidelity to this new normative structure is required."* (GLJ, [40]).

The judges found this introduced a *"relevant framework of contemporary values"*, which meant the public's confidence in justice for persons claiming child abuse outweighed any prejudice and injustice that might be caused to institutions from the delay in bringing proceedings.

The judges concluded that the *"mere effluxion of time and the inevitable impoverishment of the evidence which the passing of time engenders"* could not on its own be considered an "exceptional circumstance" worthy of a permanent stay.

Factual considerations

A majority of the judges found that the orders granting a permanent stay of proceedings should be set aside for the following reasons:

1. Father Anderson was a not a defendant to the proceedings.
2. While the allegations were not put to Father Anderson, there was sufficient evidence from which the church could reasonably infer he would have denied the allegations (i.e. he would have denied on oath having any "romantic interest" in girls during his laicisation process in 1971).
3. It could be reasonably inferred from the documentary evidence of Father Anderson denying allegations of sexual abuse while he was alive, that he would have denied the allegations of GLJ.
4. The laicisation process gave the church the opportunity to make further inquiries about Father Anderson having sexually abused children, including GLJ.
5. The death of Father Anderson in 1996 did not prevent the church from *"finding to its own satisfaction that complaints of sexual abuse by him while a priest had been substantiated and should be the subject of the payment of monetary compensation"* (GLJ, [80]).
6. There was a "considerable body of documentary evidence" available to the church.

Had the factual matrix of the case been different, the High Court may have reached a different decision regarding a permanent stay of proceedings.

IMPLICATIONS

The High Court decision clearly raises the bar for the exceptional circumstances in which an application for a permanent stay should be granted in historical abuse cases.

Some factors which clearly remain relevant, however, are the passage of time, and whether the proceedings would be vexatious or oppressive in those circumstances. Where the institution has no relevant guidelines or policies, and where there is no institutional memory regarding the employment of the alleged perpetrator, a permanent stay application may still succeed.

Case law has not yet addressed whether a permanent stay of proceedings should be granted where the perpetrator is *not* identified. It remains to be seen how the court will address this issue.

Where a government agency, or an institution operated by a government agency, is named as the defendant in an historical abuse claim, it will not only be important for the agency to consider the guidance provided by the High Court, but also its model litigant obligations in deciding whether to pursue a permanent stay application.

Legal professional privilege and experts' reports – what's covered, what's not, and how difficult it can be to get it right

Author: David Creais

Legal professional privilege (LPP for short) is an essential aspect of the law, enabling lawyers and clients to communicate in confidence, without fear of information being disclosed to others or used in court without their consent.

It generally covers:

- documents and communications prepared for giving or receiving legal advice
- documents and communications prepared for actual or anticipated litigation.

For LPP to apply, a communication or contents of a document must be made in confidence in the first place. That confidence must then be maintained if the privilege is to remain in place.

LPP does not just cover lawyer-client communications. It may also cover material (such as reports) created by an expert, or ancillary documents such as letters between lawyer and expert, notes and memos taken during discussions with an expert witness, and draft reports.

However, exactly *what* is protected will vary depending on context.

At common law, privilege attaches to confidential **communications** only, not entire documents. If a document contains privileged communication, the communication is protected, but the rest of the document is not.

At common law, then, an expert's working notes would generally not be covered by LPP, as they would not expose confidential communications between lawyer and client.

Under the *Evidence Act 1995*, however, confidential **documents** created primarily to provide legal advice or services relating to current or anticipated litigation *are* covered. Generally, the *Evidence Act* applies to proceedings in state and federal courts (and before other tribunals required to apply the laws of evidence).

Under the *Evidence Act*, therefore, an expert's working notes could very well be protected.

Failure to understand this somewhat technical area of law can result in sensitive material contained in an expert's notes or draft reports, or communications with experts, being revealed at great cost to the affected party.

This point was clearly illustrated in *Ghorbanzadeh v Western Sydney Local Health District*.

Background

The plaintiff sued the Western Sydney Local Health District (**LHD**) alleging negligence during a difficult birth that caused her injury.

The LHD's solicitors instructed Dr Roach, a medico-legal expert, via letter enclosing hospital records, the statement of claim, and the report of the expert retained by the plaintiff. Dr Roach was instructed to review the brief of materials and discuss his opinion with the instructing solicitor.

After Dr Roach received the letter of instruction and brief of materials, he composed two pages of handwritten notes. He then had a phone conference with the LHD's solicitor in which he referred to his notes. The solicitor subsequently gave written legal advice to her client and included the information she had gleaned from the phone conference.

Dr Roach was then instructed to prepare a written report, which was served on the plaintiff's solicitors.

The plaintiff issued a subpoena to produce to Dr Roach. The handwritten notes were caught by the subpoena. The LHD claimed privilege.

The issues

Although the context was court proceedings, due to an exception in the *Uniform Civil Procedure Rules,* the *Evidence Act 1995* didn't apply in this situation. Only communications and not documents might therefore be covered by LPP in this instance.

The plaintiff submitted that the handwritten notes were no more than a "piece of paper" and were not a communication.

The LHD said they had converted the handwritten notes into a communication, because Dr Roach stated that he used them as the basis for expressing his verbal opinion to the LHD's solicitor.

Judgment

The Court ruled that the document was not a communication, but merely a working note on which Dr Roach's discussion or opinion may have been based.

The Court cited *Ryder v Frohlich* [2005] NSWSC 1342 at [12]:

> *The point made here is that privilege can only attach to documents which embody communication between the expert and the litigant by whom the expert is retained (or the litigant's lawyer). A draft report prepared by the expert is not, of its nature, such a communication. It may be that the draft report is, in fact, given or sent by the expert to the litigant or the litigant's lawyer, but that does not change its character as something prepared by the expert which is not intended to be a means of communication with the litigant or lawyer.*

On waiver, the Court commented:

> *Ordinarily disclosure of the expert's report for the purpose of reliance on it in the litigation will result in an implied waiver of the privilege in respect of the brief or instructions or documents referred to ..., at least if the appropriate inference to be drawn is that they were used in a way that could be said to influence the content of the report, because, in these circumstances, it would be unfair for the client to rely on the report without disclosure of the brief, instructions or documents.*

The Court noted that Dr Roach did not say in his affidavit that the handwritten notes played no part in the formation of his opinion.

While the report Dr Roach ultimately produced was an answer to six specific questions, unlike the discussion during the phone conference, there was nothing to say the six questions did not cover material contained in the handwritten notes.

The notes were not privileged at common law.

WHAT DOES THIS MEAN FOR DRAFT REPORTS?

Usually, draft reports attract privilege because they are prepared for the dominant purpose of providing legal advice or services to a client.

But if a draft report is created predominantly for preparing the final report itself, there may be no privilege at common law, as such a draft would be characterised merely as working notes.

Also, there will be a waiver of privilege if there is something in the final report that refers to earlier correspondence and material changes having been made to the draft report.

FINAL REPORTS

Obviously, if a final report is served, thereby no longer maintaining confidentiality, privilege will have been waived.

If a final report is not served, then provided it was created for the dominant purpose of the provision of legal advice or in relation to anticipated or current litigation, it will be privileged.

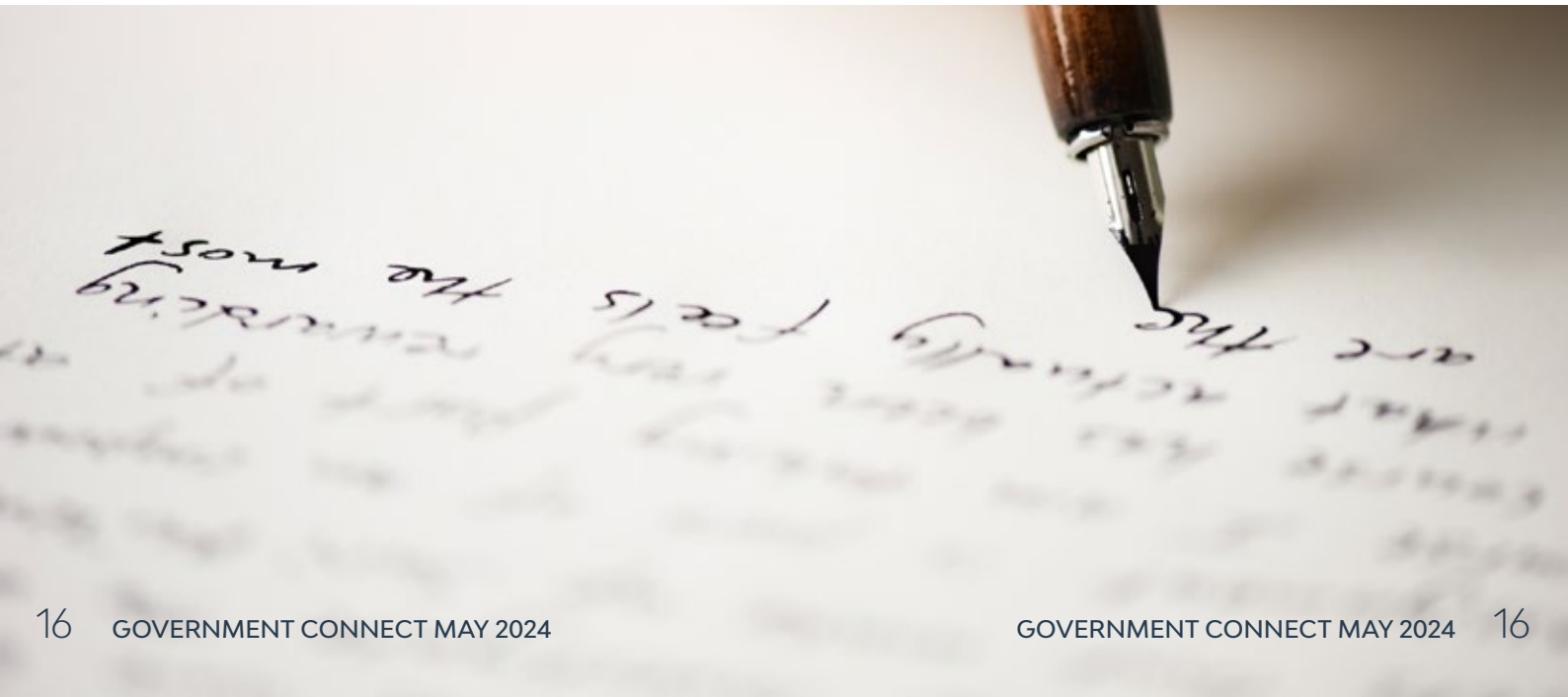
However, there is no property in a witness, including an expert witness. So it is not unheard of for a plaintiff's expert to be subpoenaed and called by a defendant to give evidence, and vice versa.

IN SUMMARY, LEGAL ADVICE IS ESSENTIAL

The concept and application of the principles of legal professional privilege can be difficult and technical.

Getting it wrong where sensitive material is contained in expert's notes or draft reports, or in communications with experts, can be extremely damaging to a party's case.

Accordingly, engaging an expert to produce a report in connection with obtaining legal advice or litigation should be closely managed by legal advisers.



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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. 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

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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 110 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
- Workplace Law & Culture

YOUR THOUGHTS AND FEEDBACK

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

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

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