Construction Issues

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Architects' liability for pure economic loss

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Architects’ liability for pure economic loss: spotlight case

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Introduction

Victoria University of Manchester v Hugh Wilson (1984) 2 Con LR 43

- This case concerned the construction of a unique university campus building, which called for reinforced concrete to be clad partly in red bricks and partly in ceramic tiles.

- Tiles began to fall from the building. The University completed remediation works and sought to recover the cost of these works from the architect and the head contractor.

Victoria University Manchester (1950)

Architects' liability for pure economic loss: spotlight case

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Key facts

- University procures the two-phased construction of its Precinct Centre between 1968 and 1976.
- Architect's initial design called for a building of reinforced concrete clad partly of bricks and partly of ceramic tiles. This was a relatively novel design.
- In 1980, tiles began to fall from the building. The University issued a writ against:
  - Architects: claiming negligence
  - Contractors: claiming breach of contract and/or negligence and/or breach of statutory duty
  - Subcontractors: claiming negligence
- The University claimed damages for the costs of remedial works to reclad the building against each defendant.

The Victoria University Precinct Centre

Architects' liability for pure economic loss: spotlight case

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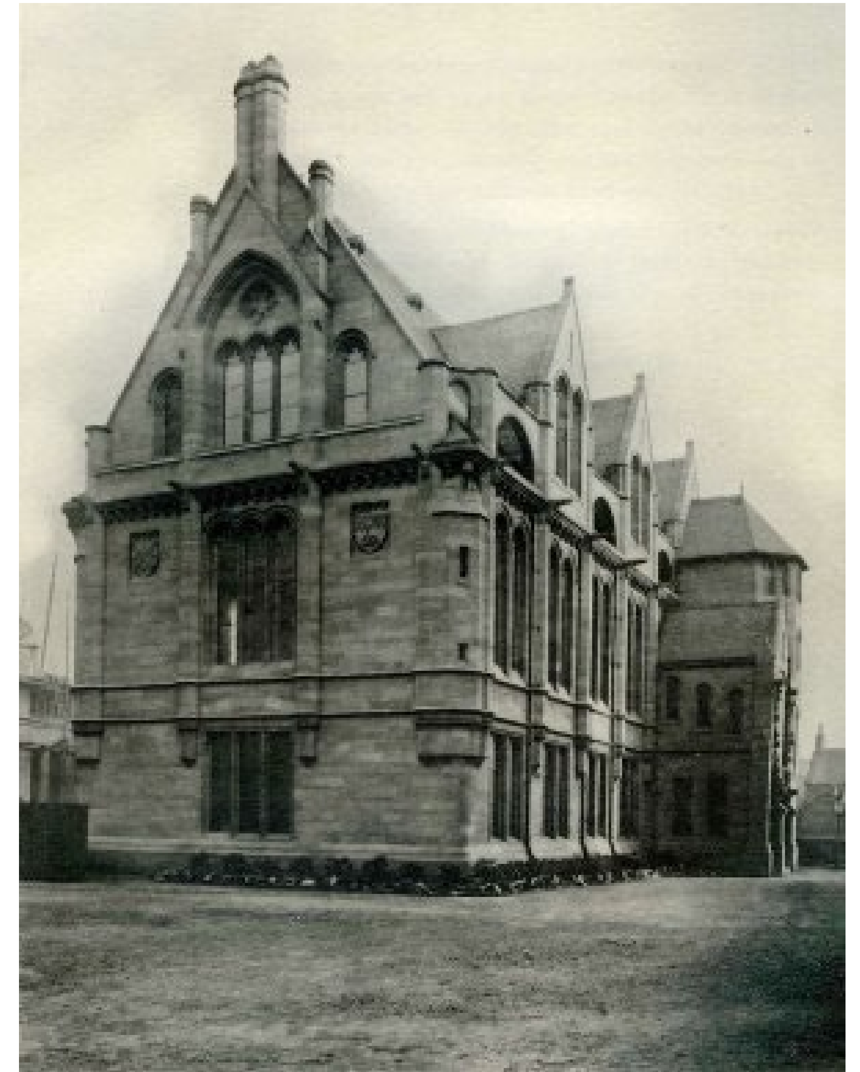
Key facts

- As the trial developed, the University and the architect reached a settlement. The settlement terms encouraged the University and the architects to form an alliance against the contractor (the sub-contractor having gone into liquidation). The Judge still considered the claim against the architects.
- Case against the architect:
  - Term of their engagements that (a) they would design and supervise the project with reasonable care and (b) materials used would be reasonably fit for purpose
  - Owed the University a duty of care in negligence
  - In breach of the above duties, they did not control and supervise properly and designed negligently, which caused the tile failure.



Architects' liability for pure economic loss: spotlight case

Ruling

Held (Judge John Newey QC):

- The design was defective.
- Due to the relationship of proximity between the architects and the University, the former should have warned about the inherent dangers in the new design.
- Architects were in breach of their duty owed to the University and would have been liable to the University had the parties not reached settlement.

"I think, however, that architects who are venturing into the untried or little tried would be wise to warn their clients specifically of what they are doing and to obtain their express approval." (at 74)

Victoria University historical buildings

Architects’ liability for pure economic loss: Australian position

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Pure economic loss vs. personal or property damage

In cases of *pure economic loss,* the Australian position places importance on the “vulnerability” of the plaintiff: “a reference to the plaintiff's inability to protect itself from the consequences of a defendant's want of reasonable care, either entirely or at least in a way which would cast the consequences of loss on the defendant.” (*Woolcock Street Investments* [2004] HCA 16, [23])

For *personal or property damage*, the duty will be based on the relationship of proximity between the parties → reasonable foreseeability.

Hawkins v Clayton (1988) 164 CLR 539 at 96:

*“Thus, a **relationship of proximity** ordinarily exists between the architect or builder of a … building … and the members of the class of persons who will in future years be born or housed in it. That relationship of proximity is such as to give rise to a **duty of care to avoid a real risk of injury by reason of faulty design** of the building.”*

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Architects' liability for pure economic loss: Australian position

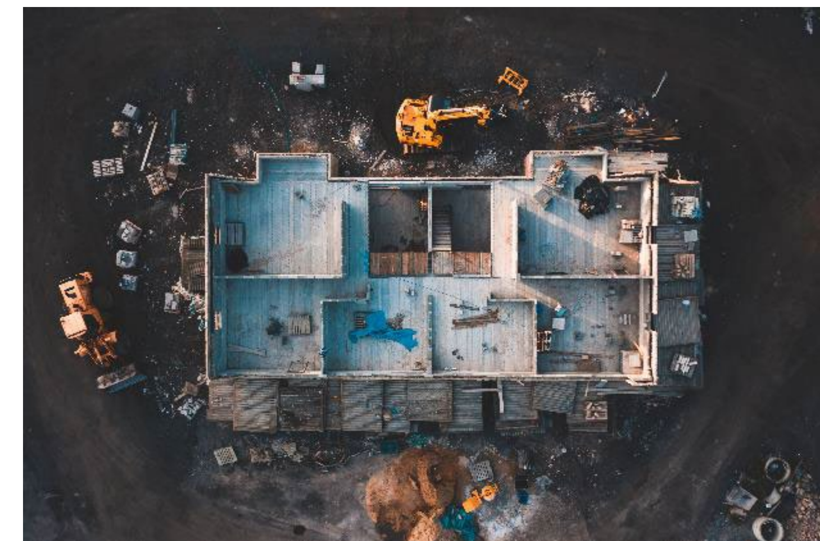
Pure economic loss vs. property damage (construction context)

Pure economic loss:

- Cracks in walls from inadequate footings (*Bryan v Maloney* (1995) 128 ALR 163)
- Building suffering substantial structural distress due to foundations (*Woolcock Street Investments Pty Ltd v CDG Pty Ltd* (2004) 216 CLR 515)
- Damage to pumping systems and stains requiring rectification from inadequate flood prevention (*Makawe Pty Ltd v Randwick City Council* [2009] NSWCA 412)

Personal / property damage:

- Defective drainpipes which caused overflow into defendant's neighbouring property (*Sutherland Shire Council v Becker* [2006] NSWCA 344)
- Stage flooring collapsed under person (*Voli v Inglewood Shire Council* (1963) 110 CLR 74)
- Contaminated fluid soaking into soil and large concrete slabs (*Hamcor Pty Ltd v State of Queensland* [2014] QSC 224)



Architects' liability for pure economic loss: Australian position

Comparing the Australian and English position of recoverability of pure economic loss

How can we reconcile the English test of "proximity" with the Australian development of the plaintiff's "vulnerability" in the context of a novel design?

In *Brookfield Multiplex Ltd v Owners Corp Strata Plan 61288* [2014] HCA 36, the High Court held (at [58]):

*"The **making of contracts** which expressly provided for what quality of work was promised demonstrates the ability of the parties to protect against, and **denies their vulnerability** to, any lack of care by the builder in performance of its contractual obligations. It was not suggested that the parties could not protect their own interests. <u>The builder did not owe the Owners Corporation a duty of care</u>."*

Architects' liability for pure economic loss: key takeaways

Where the architect has not warned of the dangers of a novel design, nor supervised the ongoing works of the project, a cause of action in negligence for pure economic loss may arise if the proprietor can establish a 'special relationship' – through vulnerability – between the parties.

However, the existence of contractual forms of protection (i.e., design warranties and assigning liability for design risk) will be a strong indicator against vulnerability.

Personal / property damage is based on reasonable foreseeability however is a different cause of action.

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Construction and industrial relations

Incidence of industrial disputes

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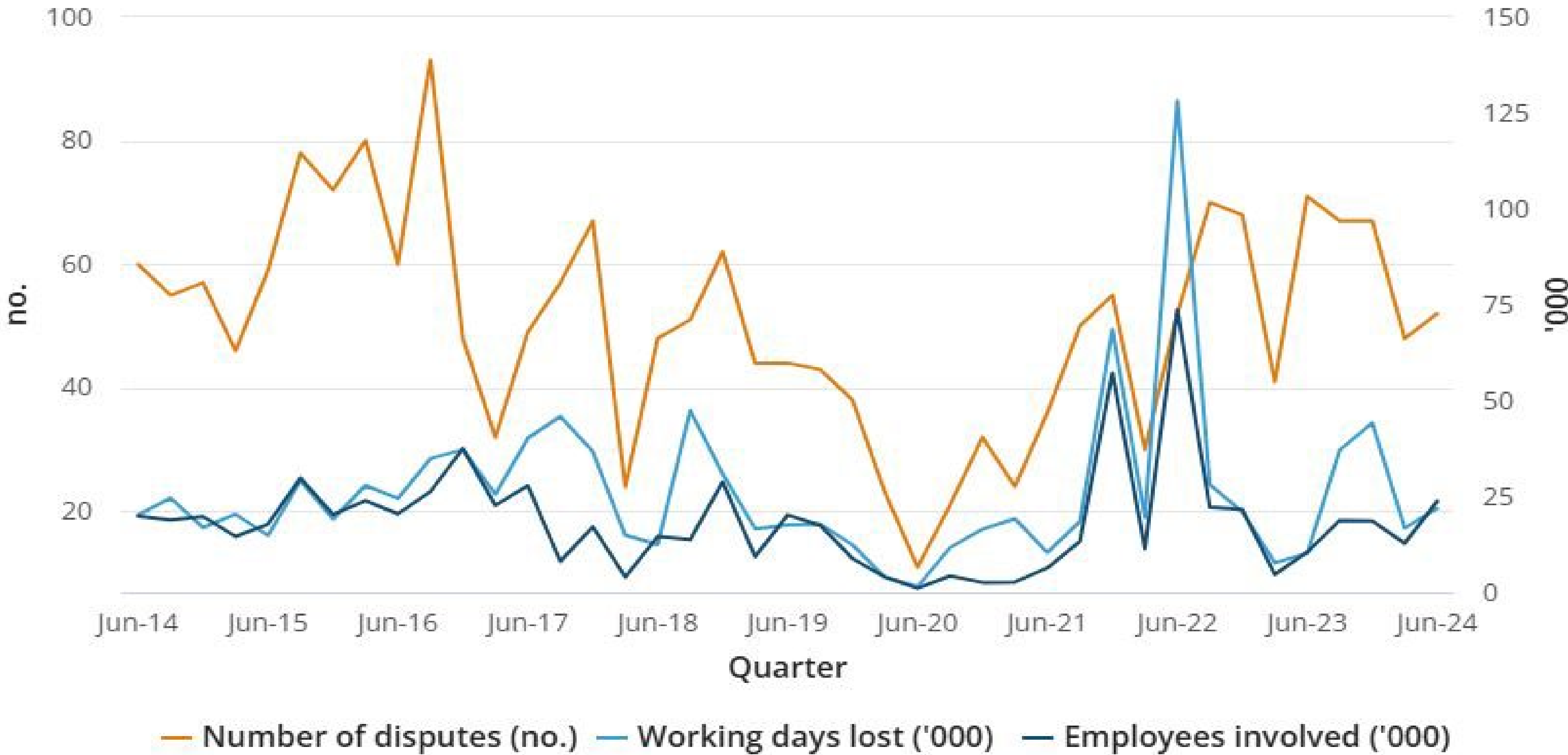

Source: Australian Bureau of Statistics

ABS: June Quarter 2024

- 52 industrial disputes (*increase from 48*)
- 23,800 employees involved (*increase from 12,800*)
- 21,900 working days lost (*increase from 16,800*)
- Construction industry the highest incidence of working days lost (*8,900 of the 21,900 working days*)

CFMEU Administration

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- **12 July 2024** – Resignation of John Setka
- **14 July 2024** – '*Building Bad*' 60 Minutes
- **15 July 2024** – Victorian Branch of Construction Division placed into voluntary administration
- **15 July 2024** – Victorian government request to Police / IBAC to investigate allegations
- **30 July 2024** – FWC increase scrutiny of B&C enterprise agreements
- **21 August 2024** – *Your Union, Your Choice* campaign
- **23 August 2024** – Construction and General Division of CFMEU (incl. all branches) placed into administration, Mark Irving KC appointed as administrator
- **3 September 2024** – High Court challenge

Impact on the industry

- Delays in ability to make enterprise agreements / set labour costs
- Industrial unrest (rallies and other disruptions)
- Absenteeism
- Abortive works
- Supply chain pressure
- Low productivity
- Subcontractor claims on the rise

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Impacts on the sector

- The sector undertakes a considerable amount of construction work
- Industrial environment is **not** likely to change in the next 6 months
- The downstream impacts will soon start to show
- More robust relationships with contractors
- Management of day to day industrial issues (right of entry, protected action, safety complaints)

Implied fitness for purpose warranty

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Implied fitness for purpose warranty: spotlight case

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Introduction

University of Warwick v McAlpine (1988) 42 BLR 1, QB

- This case involved remedial works – resin injection into faulty tiling – which were undertaken by a third-party contractor at the direction of the University.
- The head contractor was not involved in this decision and did not think these were suitable remedial works.
- The case considers the extent of a contractor's duty where third-party works are being conducted without its approval (notwithstanding the existence of contractual arrangements).

Epoxy Resin Injection

Implied fitness for purpose warranty: spotlight case

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Key facts

University of Warwick v McAlpine (1988) 42 BLR 1, QB

- In 1963, the University originally engaged McAlpine as head contractor for the construction of several buildings on campus.
- In 1969, the tiling began to fail, after which the university commenced proceedings against McAlpine and YRM (the architect). McAlpine agreed to commence remedial works.
- In 1973, partway through these remedial works, the University decided to change tact and engage a third party (CCL) under a trial sole licensing agreement to inject epoxy resin behind the failed tiling – CCL were eventually engaged by McAlpine via contract to complete the resin works at the direction of the University.

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Implied fitness for purpose warranty: spotlight case

Key facts (cont.)

University of Warwick v McAlpine (1988) 42 BLR 1, QB

- The hiring of CCL required a variation to the original contract between the University and McAlpine. McAlpine engaged CCL and procured an indemnity from CCL to cover any liability owed to the University. McAlpine disclaimed responsibility for the works to the University.
- In 1975, McAlpine issued a final certificate for the works. In 1977, new cracking in the building had appeared (the resin treatment having failed).
- The University argued – among other things – that McAlpine had breached an implied term to supply epoxy resin that was fit for purpose.

University of Warwick

Implied fitness for purpose warranty: spotlight case

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Ruling

Held (Garland J):

No implied term for fitness for purpose of the resin in contract between University and McAlpine.

This was because a term for fitness for purpose could <u>only</u> be implied if the University had relied on McAlpine.

At 16:

"[The University] could have taken an express warranty from McAlpine or they could have taken a direct warranty from CCL. Indeed, in the circumstances and given the concern about CCL's guarantee, I am surprised that they did not. I therefore find McAlpine not liable in contract to the University."

University of Warwick

Implied fitness for purpose warranty: implying terms ad hoc (in fact)

How are terms implied ad hoc in Australian law?

BP Refinery (Westernport) Pty Ltd v Shire of Hastings (1977) 180 CLR 266:

1. the term must be **reasonable** and **equitable**;
2. the term must be necessary to give **business efficacy** to the contract;
3. the term must be **obvious**;
4. the term must be capable of **clear expression**; and
5. the term must **not contradict** any express term of the contract.

Where the contractor makes clear that it does not take responsibility over a portion of the works, the implied fitness for purpose might **contradict** an express term of the contract.

Alternatively, consider whether it is **reasonable** and **equitable** to imply the term in the circumstances.

Implied fitness for purpose warranty: Australian position

Australian position: implied in fact vs. implied in law.

The *BP Refinery* test is used to imply the fitness for purpose term ad hoc, as a term implied in fact.

As a matter of law, there is an implied fitness for purpose where the proprietor has relied on the contractor's skill and judgement (*Stewart v Reavell's Garage* [1952] 2 QB 545).

Cable Ltd v Hutcherson Bros Pty Ltd (1969) 123 CLR 143:

*"In reaching a conclusion, the fact that it can be seen that **reliance is placed upon the skill and judgment of the builder** may on occasions be an important if not a decisive consideration."*

Implied fitness for purpose warranty: Key takeaways

There are two avenues to implying a fitness for purpose warranty:

(1) at law → reliance on skill and judgement (*Warwick, Stewart, Cable*)

(2) in fact → *BP Refinery* factors (reasonable, business efficacy, obvious, clear, no contradiction)

Where the contractor expressly disclaims responsibility for a portion of the works, this will vitiate the term at law (due to no reliance). In fact, the contractor's disclamation may form an express term of the contract which an implied FFP warranty cannot contradict or be considered unreasonable.

Work health and safety

Safety and construction work

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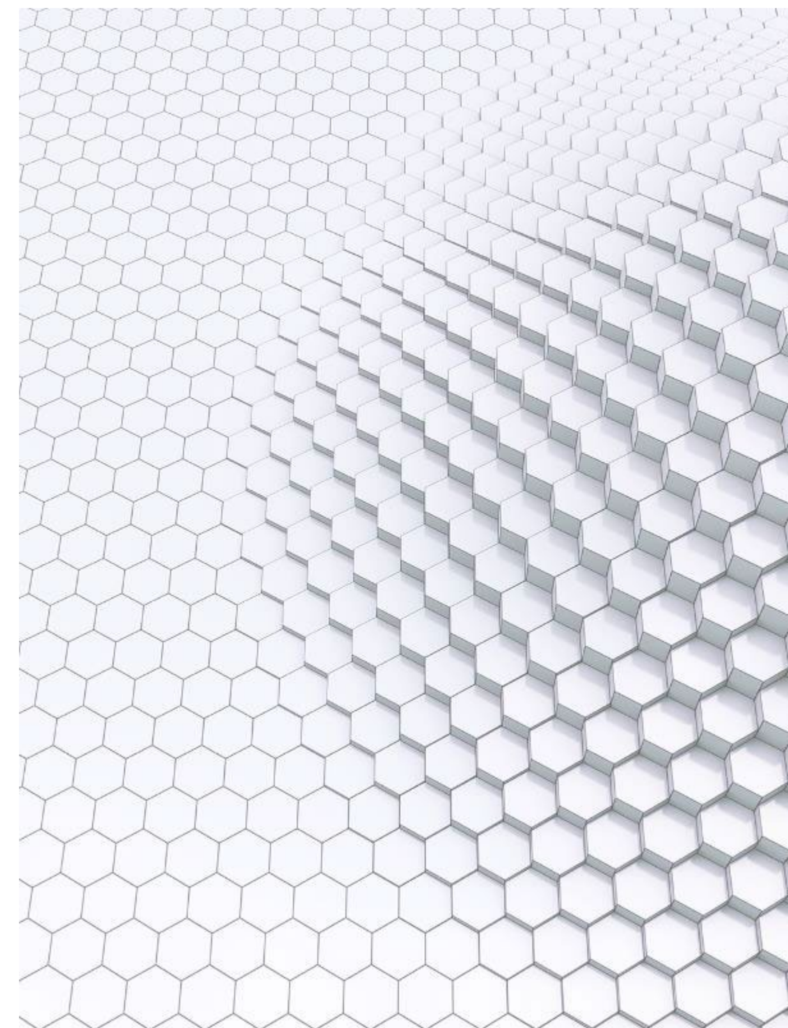
Specific duties on persons commissioning construction work to:

- consult, so far as is reasonably practicable, with the designer of the structure about how to ensure risks to health and safety in the design are eliminated / minimised
- take reasonable steps to have a copy of the designer's safety report
- give the principal contractor information in relation to hazards and risks at, or in the vicinity of, the workplace

When it comes to contractors:

- Diligent selection of contractors who are appropriately qualified and trained.
- Imposition of requirements on contractors to:
  - Report health and safety risks.
  - Provide reasonable assistance in the event of an incident.
- A process for ending the engagement of a contractor if the work is unsafe.
- An evaluation process at the end of the work to determine if appropriate for future work.

How much control do you want?



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Safework NSW v McConnell Dowell Constructors (No 2) [2020] NSWDC 668 Contractor and Principal – Who is Responsible?

- Question of control over contractor is relevant to what is reasonably practicable.
- PCBU is entitled to rely on contractor to do work safely if they have the skill and expertise (including safety issues).
- There may be cases where it was reasonable for PCBU to give instructions about how the work should be done, or about safety measures.
- PCBU cannot assume someone else will attend to safety issues, but if inquiries made, assurances given, and reasonable belief in competence of the contractor, that may be enough.

Trends

- Institutional funders becoming more sophisticated
- Increase in ‘active client’ model
- Peer reviews, third party reports, testing / inquiries of contractors
- Noticeable ‘race to the top’ with respect to WHS compliance where multiple parties involved in the construction project
- These require careful consideration in the context of the sector

Safety governance

- Universities have unique governance structures
  - ➢ Formal authorities clearly identify decision-makers
  - ➢ Decisions are often the result of consideration in small groups or committees
  - ➢ Decisions often made of recommendation

- University lawyers have a valuable role in this process, particularly with large scale projects
  - ➢ Assisting to brief decision-makers
  - ➢ Identify the suite of options available
  - ➢ Ensuring there is the necessary and relevant information to make decisions

Workplace reforms

Changes at a snapshot

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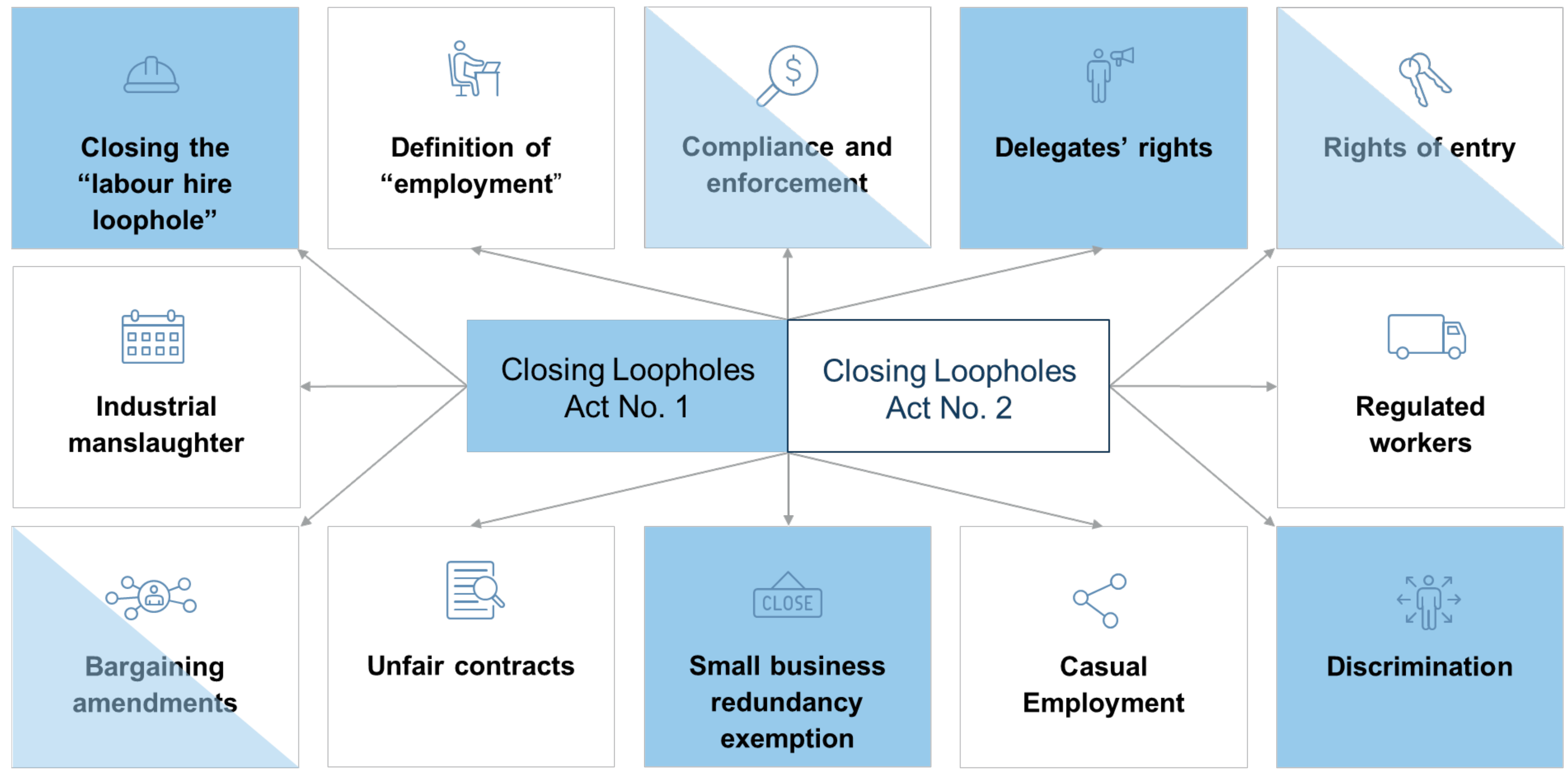

Managing multiple contractors

Managing multiple contractors: spotlight case

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Introduction

Broadway Maintenance Corp v Rutgers State University (1982) 447 A 2d 906, SC(US)

- This case involved the construction of a medical school on University campus procured via separate contracting (c.f. traditional head contractor model)
- In 1966, the University engaged nine separate contractors for the construction.
- Like the construction management model, Briscoe (general construction works) agreed to act as a supervisor and to coordinate works with the other contractors.
- The project became heavily delayed and was completed well beyond the date for practical completion.

Rutgers New Jersey Medical School

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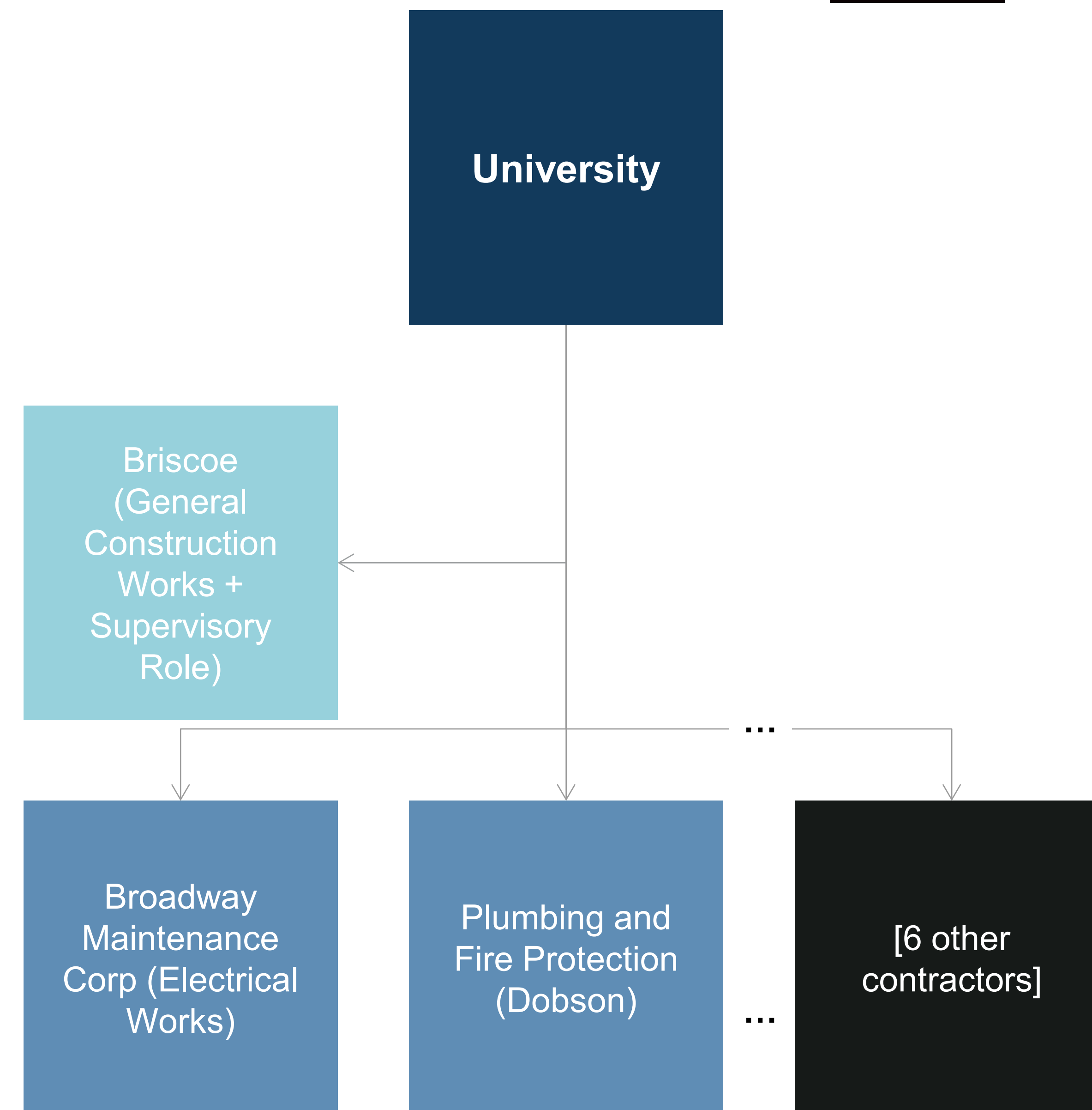
Managing multiple contractors: spotlight case

Key facts

Broadway Maintenance Corp v Rutgers State University (1982) 447 A 2d 906, SC(US)

- Procurement model was like a construction management model.
- Typically, the proprietor is liable for delay. In this case, the University had engaged Briscoe to act as the supervisor on the job and coordinator of all the contractors.
- Plumbing and electrical contractors filed separate claims against the University for delay damages claiming disruption and failure to coordinate the activities of the contractors on the site. The University claimed indemnification from Briscoe.



Managing multiple contractors: spotlight case

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Ruling

Held (Schreiber J):

At 913: “When viewed in its entirety, the contractual scheme contemplated that if a contractor were adversely affected by delays, it could maintain an action for costs and expenses **against the fellow contractor** who was a wrongdoer.”

In the trade contractors’ contracts:

- Briscoe was explicitly referred to as having supervisory responsibility; and
- the trade contractors agreed that they were each liable to each other for their own unnecessary delay, and had authorised the University to withholds funds to satisfy delay damages payable to other contractors for this reason.

The contractors were held to be third party beneficiaries of (a) the contract between Briscoe and the University, and (b) every other trade contractor arrangement.

Therefore, the University was not liable for these delays. The contractors could claim against Briscoe / other trade contractors for damages.

Managing multiple contractors: third-party beneficiaries

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Australian Position: Third-Party Beneficiaries

Doctrine of Privity: under a third-party benefit contract the promisee alone is entitled to exercise any rights or remedies for breach: the promisee may obtain an order for damages.

The only narrow exception to this rule is in the insurance context: *Trident General Insurance Co Ltd v McNiece Bros Pty Ltd* (1988) 165 CLR 107. Here, a third-party beneficiary can enforce a contract.

In Australia, the contractual scheme in *Rutgers* would not be interpreted in the same as it was in US jurisdiction: the contractors would not be able to enforce the contract between the University and Briscoe, despite being a third-party beneficiary to it.

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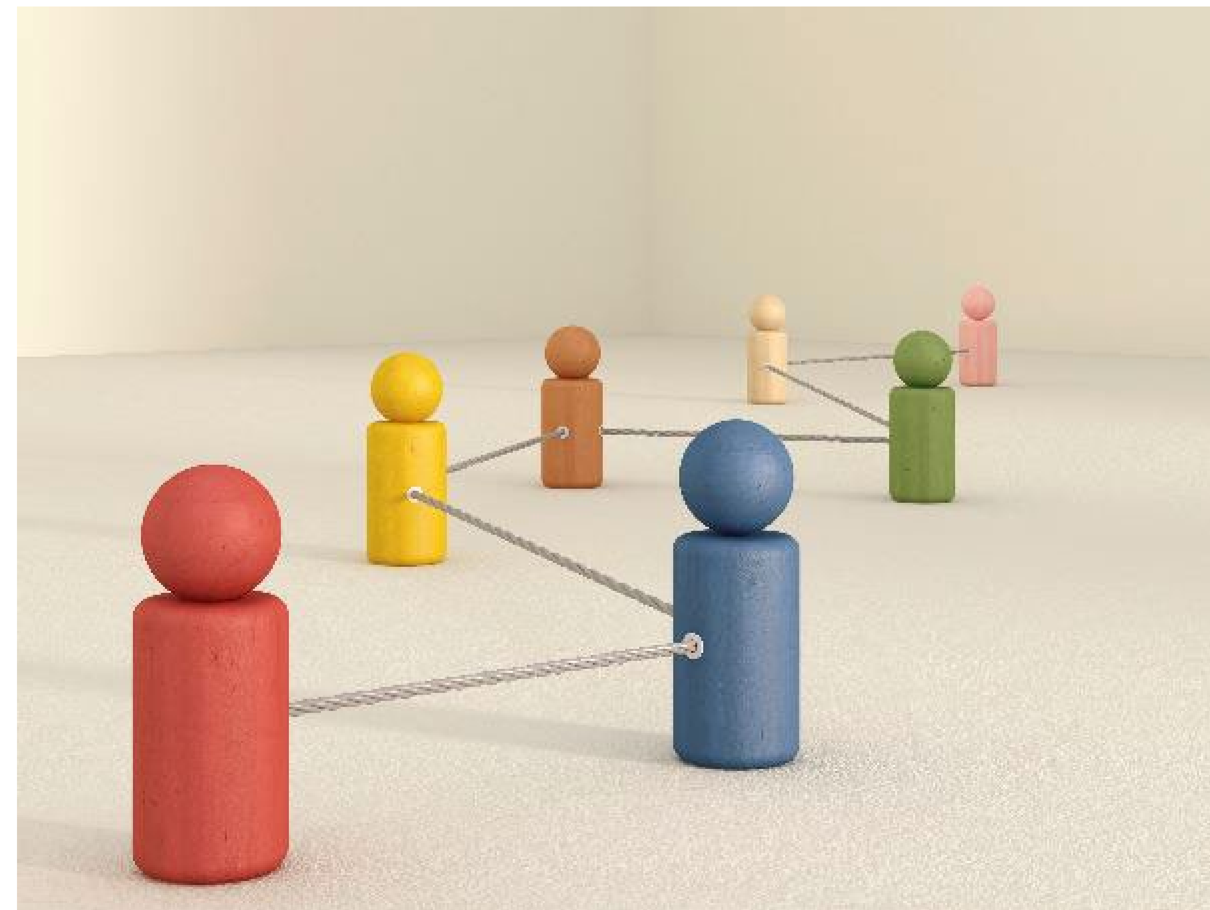
Managing multiple contractors: Key takeaways

Key takeaways

The construction management model is a distributed contracting strategy. This means that generally, the proprietor will be liable for taking on coordination risk.

However, when engaging another party to manage that risk, ensure that there is adequate redress against the manager to fund the liability to the trade contractors.

Consider an indemnity from the construction manager which responds to this coordination risk.



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