

Australian High Court on *Functus Officio* and De Novo Review of Arbitration Awards

August 18, 2024

The High Court of Australia's ruling in **CBI Constructors Pty Ltd v Chevron Australia Pty Ltd [2024] HCA 28** marks a significant development in the jurisprudence surrounding the **finality of arbitral awards** and the extent to which courts can intervene in arbitral proceedings. This decision centers on whether an arbitral tribunal, after issuing an interim award, could revisit issues that were argued to be conclusively settled by that interim award. The Court's ruling provides important guidance on the application of the ***functus officio*** doctrine and the standard of judicial review for setting aside arbitral awards under the **Commercial Arbitration Act 2012 (WA)**.

Background

The dispute between CBI Constructors Pty Ltd ("CKJV") and Chevron Australia Pty Ltd arose from a contract related to the Gorgon Project, a major offshore oil and gas development. CKJV, under the contract, supplied staff for the project, and a dispute emerged over the reimbursement of staff costs. CKJV argued that Chevron underpaid, while Chevron counterclaimed that it had overpaid.

The arbitration was conducted under the **UNCITRAL Arbitration Rules** and was bifurcated into separate hearings on liability and quantum. The arbitral tribunal issued an interim award in December 2018 (the "First Interim Award"), addressing all liability issues. The tribunal concluded that CKJV was entitled only to actual costs, rejecting CKJV's claim for

higher contractual rates.

Following this, CKJV sought to advance a new argument—the “Contract Criteria Case”—which pertained to how the “actual costs” should be calculated. Chevron objected, arguing that the tribunal was **functus officio** and thus lacked the authority to address any further liability issues. Despite these objections, the tribunal issued a second interim award (the “Second Interim Award”), allowing CKJV’s new argument to proceed.

Chevron then applied to the Supreme Court of Western Australia to set aside the Second Interim Award, arguing it exceeded the tribunal’s jurisdiction. The Supreme Court and the Court of Appeal agreed with Chevron, finding that the tribunal was **functus officio** and had overstepped its jurisdiction by revisiting liability issues settled by the First Interim Award. CKJV appealed to the High Court of Australia.

The High Court’s Decision

The High Court was tasked with determining two central issues:

1. **Whether the tribunal was functus officio** after issuing the First Interim Award, thus precluding it from addressing the Contract Criteria Case in the Second Interim Award.
2. **Whether the Supreme Court of Western Australia applied the correct standard of review** in setting aside the Second Interim Award.

Functus Officio and the Scope of Tribunal Authority

The High Court’s analysis began with the principle of **functus officio**—the idea that once a tribunal has issued a final decision on a matter, it cannot revisit that decision. However, the Court found that this principle did not apply in the manner the lower courts had concluded. The Court stated, “The end result is that the search for a justification for a

conclusion by a court that the First Interim Award rendered the arbitral tribunal functus officio with respect to the matters the subject of that award fails.” This meant that the tribunal retained jurisdiction to issue the Second Interim Award.

The Court emphasized that the First Interim Award, while final on the issues it addressed, did not cover all aspects of the dispute. Specifically, it did not conclusively resolve how the “actual costs” should be calculated, leaving room for further determination. As such, the tribunal was within its rights to address the Contract Criteria Case in the Second Interim Award.

The Court highlighted that **“an award can be ‘final’ in a number of ways or senses,”** and in this instance, the First Interim Award was final only concerning the issues it explicitly resolved. The tribunal’s decision to entertain the Contract Criteria Case in the Second Interim Award did not overstep its jurisdiction.

Judicial Review and the Standard of Intervention

On the second issue, the High Court scrutinized the standard of review applied by the Supreme Court. CKJV had argued that the courts should defer to the tribunal’s interpretation of its own jurisdiction. However, the High Court found that the courts were entitled to conduct a **de novo** review when jurisdictional questions arose. The Court affirmed that **“the correctness standard has been adopted”** in such cases, meaning the courts should independently assess whether the tribunal exceeded its jurisdiction.

However, the High Court ultimately determined that the tribunal had not exceeded its jurisdiction in issuing the Second Interim Award. As a result, the Court concluded that the Supreme Court had erred in setting aside the award, as there was no basis for concluding that the tribunal acted

beyond the scope of the arbitration agreement.

Implications for Arbitration Practice

The High Court's decision in **CBI Constructors Pty Ltd v Chevron Australia Pty Ltd** reinforces the **finality of arbitral awards** while also acknowledging the flexibility of tribunals to manage the arbitration process, including issuing multiple awards on different aspects of a dispute. The ruling clarifies that tribunals are not *functus officio* in relation to issues that remain unresolved, even after an interim award has been made.

This case also underscores the limited scope of judicial intervention in arbitration. Courts are empowered to review arbitral awards, but only within strict confines. The High Court's emphasis on the **de novo** standard for reviewing jurisdictional issues reaffirms that while courts have a role in overseeing arbitration, their intervention is appropriately circumscribed to ensure that the arbitration process remains efficient and final, consistent with the parties' agreement.

In summary, the decision serves as a reminder that while arbitration provides a final and binding resolution to disputes, the tribunal's authority is not extinguished by interim decisions unless those decisions fully resolve the issues in question. This ruling will likely influence the conduct of future arbitrations, particularly in how parties and tribunals structure interim awards and approach unresolved issues.

Author: Mahmoud Abuwasel

Title: Partner – Disputes

Email: mabuwasel@waselandwasel.com

Profile:

<https://waselandwasel.com/about/mahmoud-abuwasel/>

Lawyers and consultants.

Tier-1 services since 1799.

www.waselandwasel.com

business@waselandwasel.com

Subpoenas in Arbitration in Australia: Recent Guidance by the Supreme Court of Victoria

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In the recent decision of *Carlisle Homes Pty Ltd v Schiavello Construction (Vic) Pty Ltd* [2024] VSC 283, Justice Croft of the Supreme Court of Victoria has provided a critical judgment that underscores the principles governing the issuance of subpoenas in the context of commercial arbitration. This ruling, delivered on May 31, 2024, is a significant addition to the jurisprudence on arbitration and reinforces the court's supportive role in arbitral proceedings.

Background of the Case

The dispute arose between Schiavello Construction (Vic) Pty Ltd ('Schiavello') and Carlisle Homes Pty Ltd ('Carlisle') over the management of fit-out works at a property in Mulgrave. Schiavello, the applicant in the arbitral proceedings, sought subpoenas to compel the production of documents from three third parties involved in the installation and testing of services at the property.

Carlisle's application for the issuance of these subpoenas was made under Section 27A of the Commercial Arbitration Act 2011 (Vic) ('CAA'), which allows for court assistance in the arbitration process by issuing subpoenas for documents and examinations.

Key Issues and Submissions

Carlisle argued that the documents sought were crucial to resolving the core issues in the arbitration, specifically regarding the installation and commissioning of mechanical services and the achievement of practical completion under the relevant contract. **The application was unopposed, and the Arbitrator, David Levin KC, had provided consent for Carlisle to seek the subpoenas, reflecting a harmonious approach to procedural cooperation.**

Legislative Framework

Section 27A of the CAA and Rule 9.14 of the Supreme Court (Miscellaneous Civil Proceedings) Rules 2018 govern the issuance of subpoenas in arbitration. **The legislation requires that the court be satisfied of the necessity and reasonableness of the subpoenas and mandates that the application must be accompanied by an affidavit and a draft subpoena.** These provisions ensure that the court exercises its coercive powers judiciously, particularly when non-parties to the arbitration are involved.

Court's Reasoning and Principles Applied

Justice Croft meticulously examined the application against the legislative requirements and existing case law. In his reasoning, he highlighted several pivotal principles:

- 1. Deference to the Arbitral Tribunal:** Justice Croft emphasized that the court should show deference to the arbitral tribunal's judgment. This principle stems from the parties' consent to arbitration and the tribunal's proximity to the dispute's factual matrix. **The court should avoid 'second-guessing' the tribunal's decisions unless there is a compelling reason to do so.**
- 2. Reasonableness of the Subpoena:** The court must independently verify that the subpoena's issuance is

reasonable. This includes ensuring that the documents sought are relevant to the dispute and that the subpoena is for a legitimate forensic purpose. **The court's role is not to act as a 'rubber stamp' but to provide thoughtful judicial oversight to support the arbitral process.**

- 3. Minimizing Cost and Delay:** Justice Croft underscored the importance of minimizing costs and delays in arbitration, which is a primary advantage of this form of dispute resolution. The court's intervention should be swift and efficient, avoiding unnecessary procedural complexities that could burden the arbitration.

Implications of the Decision

The judgment in *Carlisle Homes Pty Ltd v Schiavello Construction (Vic) Pty Ltd* sets a precedent for the court's approach to supporting arbitration through the issuance of subpoenas. It affirms that while the court must ensure compliance with statutory requirements, it should also facilitate the arbitration process by respecting the arbitral tribunal's role and decisions.

This decision is particularly noteworthy for its reinforcement of the principle that the court should not act as a mere formality in arbitration-related applications. Instead, it should provide substantive judicial support that enhances the arbitration's efficacy and integrity.

Conclusion

The ruling in *Carlisle Homes Pty Ltd v Schiavello Construction (Vic) Pty Ltd* [2024] VSC 283 is a significant contribution to commercial arbitration law. **It highlights the delicate balance the court must maintain between exercising its coercive powers judiciously and supporting the arbitral process efficiently.** This decision will undoubtedly guide future applications for subpoenas in arbitration, ensuring that they are handled with

the necessary judicial scrutiny while fostering an arbitration-friendly legal environment.

For practitioners and parties involved in arbitration, this judgment provides a clear framework for understanding the court's role in the arbitration process and underscores the importance of procedural cooperation and judicial deference to arbitral tribunals. As commercial arbitration continues to evolve, such landmark decisions will play a crucial role in shaping a robust and supportive legal infrastructure for dispute resolution.

Author: Mahmoud Abuwasef

Title: Partner – Disputes

Email: mabuwasef@waselandwasef.com

Profile:

<https://waselandwasef.com/about/mahmoud-abuwasef/>

Lawyers and consultants.

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www.waselandwasef.com

business@waselandwasef.com

NSW Supreme Court Enforces Arbitration Despite Waived Preconditions in *Icon SI v. ANSTO*

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Brief

In the pivotal case of *Icon Si (Aust) Pty Ltd v Australian Nuclear Science and Technology Organisation* [2024] NSWSC 324, the Supreme Court of New South Wales rendered a decision that emphatically underscores the judiciary's commitment to enforcing arbitration clauses within commercial contracts. The

case arose from a dispute concerning a construction contract for the SyMo Facility at Lucas Heights, leading to issues between contract amendment and dispute resolution clauses.

Facts

Icon Si (Aust) Pty Ltd (Icon) engaged in a contract with the Australian Nuclear Science and Technology Organisation (ANSTO) to construct the SyMo Facility for a substantial sum. The contract incorporated a clause specifying dispute resolution procedures, including expert determination followed by arbitration if necessary. Following disputes, the parties amended the contract, waiving the expert determination but not expressly affecting the arbitration clause. ANSTO sought to enforce the arbitration agreement following further disputes, while Icon resisted, leading to court proceedings.

Arguments

Icon argued against the arbitration, contending that the amendment deed, which waived expert determination, effectively made the arbitration clause inoperative since one of the prerequisites for arbitration (the completion or waiver of expert determination) could no longer be met. They interpreted the contract and amendment as leaving no path open to arbitration.

Defenses

In contrast, ANSTO maintained that the waiver of expert determination was not intended to negate the overarching agreement to resolve disputes through arbitration. They argued that the contract, read as a whole and in light of the amendment deed, still mandated arbitration for unresolved disputes, emphasizing the contract's and the amendment deed's language and commercial objectives.

Court Interpretation

The Court sided with ANSTO, holding that the arbitration clause remained operative and binding. It determined that the parties' intention, viewed through the lens of the contract's language and the commercial context, supported the continuation of the arbitration pathway for dispute resolution. The Court highlighted that the waiver of expert determination did not equate to a waiver of arbitration but simply removed one tier of the multi-tiered dispute resolution process. Thus, disputes were still subject to arbitration as per the contract's terms.

The Honourable Justice Ball highlighted this as follows:

"As I have explained, before the Amendment Deed was executed, the parties had agreed ultimately to submit all their disputes to arbitration except to the extent that those disputes were finally resolved by expert determination. The intermediate step of expert determination was an option offered by the standard terms that formed part of their contract. Initially, the parties agreed to adopt that option through the mechanism provided in the standard terms of indicating in Annexure Part A that the option applied. When they subsequently agreed to "waive" that option, they must have intended to dispense with the option they had previously agreed to adopt. They could not have intended at the same time to dispense with their agreement ultimately to resolve all disputes by arbitration. That would involve a fundamental change to the dispute resolution mechanism they had agreed to adopt."

This interpretation leaned heavily on principles of commercial contract construction, focusing on the parties' intentions and the contract's commercial purpose. The Court also referred to statutory provisions under the *Commercial Arbitration Act 2010* (NSW), affirming the act's purpose to uphold arbitration agreements unless clearly null, void, inoperative, or incapable of being performed.

Significance

The *Icon Si v. ANSTO* decision marks a significant contribution to the body of jurisprudence surrounding arbitration in commercial disputes in Australia. Its core significance lies in the Court's determination that an arbitration agreement stands resilient, even when its prerequisites are waived by the parties.

This ruling directly addresses a nuanced area of dispute resolution law by clarifying that parties' agreement to bypass certain pre-arbitration steps, such as expert determination, does not inherently invalidate or render the subsequent arbitration agreement inoperative.

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

Lawyers and consultants.

Tier-1 services since 1799.

www.waselandwaseel.com

business@waselandwaseel.com

High Court of Australia Considers Australian Hague Rules in International Shipping Arbitration

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Introduction to the Dispute

In the case of Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG [2024] HCA 4, the High Court of Australia delivered a judgment that underscores the robustness of arbitration agreements in international

commercial contracts, even when faced with statutory provisions aimed at protecting domestic legal standards. The dispute centered around an arbitration clause in a bill of lading, which Carmichael Rail Network Pty Ltd (Carmichael) argued was rendered inoperative by Article 3(8) of the Australian Hague Rules, as incorporated into the Carriage of Goods by Sea Act 1991 (Cth) (COGSA). This provision voids any contractual clause that relieves or lessens a carrier's liability for loss or damage to goods, except as provided in the Rules.

The Core Issue

The crux of the matter was whether the arbitration clause, mandating dispute resolution in London under English law, could potentially diminish the carrier's liability contrary to the Australian Hague Rules. The Federal Court of Australia, upon considering an undertaking by BBC Chartering Carriers GmbH & Co KG (BBC) to adhere to the Australian Hague Rules as applied under Australian law in the arbitration, and a subsequent declaration to that effect, decided to stay the proceedings in favor of arbitration.

High Court's Rationale

The High Court's decision to dismiss the appeal reaffirms the principle that arbitration agreements should be upheld unless it is proven on a balance of probabilities that such agreements would invalidate the carrier's liability in a manner not sanctioned by the relevant statutory rules. The Court clarified that speculative risks concerning the potential outcomes of arbitration do not suffice to render an arbitration clause void under Article 3(8). It emphasized that the standard of proof required is not mere speculation or the possibility of a clause lessening liability but must be established on the balance of probabilities.

Implications of the Judgment

This judgment has significant implications for the enforceability of arbitration clauses in international shipping contracts, particularly those involving Australian parties. It signals a strong preference for respecting the autonomy of commercial parties to decide their dispute resolution mechanisms, provided there is no concrete evidence that such mechanisms would contravene mandatory statutory protections. The decision also highlights the importance of undertakings and declarations in assuaging concerns about the potential for arbitration to circumvent local legal standards.

Legal Analysis by the High Court

In reaching its decision, the High Court considered the arguments with a focus on Article 3(8) of the Australian Hague Rules and its impact on the arbitration clause. The Court's analysis was grounded in the legal principles governing sea carriage and international arbitration.

Examination of Article 3(8)

The Court first looked at the text of Article 3(8), aimed at preventing contractual terms that could reduce a carrier's statutory liabilities. It highlighted that the Article's language does not support speculative risks or hypothetical outcomes from arbitration. Instead, it demands clear evidence that the arbitration clause would likely lead to a reduction of the carrier's liability against the Rules.

Context and Purpose of the Australian Hague Rules

The Court also examined the context and purpose of the Australian Hague Rules within international maritime law. It noted that these Rules strike a balance between carriers and shippers, offering a uniform legal framework for global sea transport. The Court stressed that interpreting Article 3(8) should maintain this balance and not disrupt the certainty the Rules aim to establish.

The Role of Undertakings and Declarations

Significantly, the Court considered the undertaking by BBC and the Federal Court's declaration, which assured that the Australian Hague Rules, as applied under Australian law, would govern the arbitration. This commitment by BBC addressed concerns that arbitration might bypass the statutory protections of the Australian Hague Rules.

Standard of Proof Under Article 3(8)

Furthermore, the Court clarified the standard of proof under Article 3(8), stating that speculative risks are inadequate to invalidate an arbitration clause. The challenging party must prove, with reasonable certainty, that the clause would indeed lessen the carrier's statutory liability. This approach reflects the Court's intent to uphold arbitration agreements while safeguarding statutory rights.

Overview of the Australian Hague Rules

The Australian Hague Rules refer to a set of regulations that govern the international carriage of goods by sea, specifically as they are adopted and applied within Australian law. These rules are a modified version of the original Hague Rules, which were established by the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, signed in Brussels in 1924. The modifications are often influenced by subsequent amendments, such as those from the Visby Amendments (1968) and the SDR Protocol (1979), leading to what is commonly referred to as the Hague-Visby Rules.

Conclusion and Future Implications

The High Court's decision in *Carmichael Rail Network Pty Ltd v BBC Chartering Carriers GmbH & Co KG* demonstrates a careful approach to disputes involving international arbitration and maritime law. The Court emphasized the need for concrete

evidence over speculative risks, the importance of maintaining the balance established by maritime conventions, and the effectiveness of undertakings and declarations in ensuring arbitration does not undermine statutory protections. This judgment provides clear guidance for future cases on the enforceability of arbitration clauses in international shipping contracts.

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

Lawyers and consultants.

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www.waselandwaseel.com

business@waselandwaseel.com

Supreme Court of Victoria Affirms Judicial Restraint in Arbitral Appeals

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In the realm of arbitration, the delicate balance between finality and fairness often finds itself at the heart of appellate scrutiny. The recent judgment from the Victorian Supreme Court in *Factory X Pty Ltd v Gorman Services Pty Ltd* unveils yet another layer of this intricate interplay, particularly focusing on the threshold for leave to appeal questions of law emanating from arbitration awards. The court's reasoning, deeply rooted in the principles laid down by Lady Justice Arden in *HMV UK Ltd v Propinvest Friar Limited Partnership*, provides a rich tapestry for understanding the nuanced approach towards the 'obviously wrong' standard under

s 34A(3)(c) of the Commercial Arbitration Act 2011 (Vic).

The focal point of the discourse centers around Lady Justice Arden's clarification of an 'obviously wrong' decision as one that is unarguable, makes a false leap in logic, reaches a result for which there is no reasonable explanation, or represents a major intellectual aberration. The respondent, in underscoring these parameters, argued that a mere arguable error on a point of law or a divergent conclusion by the judge does not suffice to meet the threshold of 'obviously wrong'. The clarity and transparency of the error, as emphasized by the respondent, stand as indispensable requisites to traverse the appellate pathway.

The court, in its analysis, concurred with the respondent's submissions, accentuating that the arbitrator's decision should not be deemed 'obviously wrong' merely because the court might harbor a different interpretation of a contractual clause. This stance resonates with the fundamental ethos of arbitration, where deference to the arbitrator's decision is emblematic of the autonomy and finality that arbitration envisages.

Furthermore, the court's acknowledgment of the arbitrator's rejection of the applicant's construction in the arbitration award underscores the appellate reluctance to re-engage with matters of critical relevance already deliberated and dismissed by the arbitrator. This judicial restraint is emblematic of a broader jurisprudential acknowledgment of the arbitrator's role as the primary adjudicator of disputes, whose decisions are to be interfered with sparingly and only under manifestly erroneous circumstances.

The South Australian Court of Appeal's stance in *Inghams Enterprises* (10 February 2022), as highlighted by the court, further cements this principle. Despite recognizing the 'some force' in Inghams' submissions and the complex nature of the construction question, the Court was unpersuaded that the

arbitrator's decision displayed any 'obvious error'. This narrative underscores the high threshold that appellants must surmount to successfully navigate the appellate avenue.

In dissecting the contract clause, the court acknowledged the lack of clarity in its drafting and the applicant's submissions on the practical implications of the arbitrator's construction. However, the court remained unswayed by the possible merits of the applicant's construction, reiterating that the arbitrator's conclusion was not 'obviously wrong' for the purposes of s 34A of the Act. The arbitrator's meticulous consideration of other possible constructions, including those submitted by the applicant, fortified the court's stance against an obvious error in the arbitrator's decision.

This judgment, in its essence, epitomizes the judicial restraint and deference towards arbitration awards, reinforcing the high threshold for leave to appeal on questions of law. It underscores the imperative for clear and transparent errors in arbitration awards to warrant appellate intervention, thereby preserving the sanctity and finality of arbitration as a distinct and autonomous mechanism for dispute resolution..

Author: Mahmoud Abuwaseh

Title: Partner – Disputes

Email: mabuwaseh@waselandwaseh.com

Profile:

<https://waselandwaseh.com/about/mahmoud-abuwaseh/>

Lawyers and consultants.

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www.waselandwaseh.com

business@waselandwaseh.com

Unveiling the Veil of

Arbitration Secrecy: The Supreme Court of Western Australia in Wright Prospecting v Hancock Prospecting

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Introduction

The issue of confidentiality in arbitration proceedings has been a subject of considerable debate and judicial scrutiny. The recent case of Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd [2023] WASC 285 issued on 31 July 2023 in the Supreme Court of Western Australia provides a compelling backdrop to explore this complex issue. This article will delve into the nuances of confidentiality in arbitration, with a particular focus on the Wright Prospecting case, while also referencing other seminal cases that have shaped this area of law.

The Essence of Confidentiality in Arbitration: A Case Spotlight

Confidentiality is often cited as one of the key advantages of arbitration over traditional litigation. In the case of Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd, the court grappled with the issue of whether interim suppression or non-publication orders were necessary to prevent prejudice to the proper administration of justice. The case serves as a vivid illustration of the delicate balance courts must strike between upholding confidentiality and ensuring open justice.

Judicial Tests for Confidentiality: The Wright Prospecting Lens

In Wright Prospecting, the court applied several judicial tests to assess the scope of confidentiality. One such test was the “necessity test,” which is often used to weigh the need for confidentiality against the public interest in open justice. This test has its roots in the case of *Esso Australia Resources Ltd v Plowman* (1995) 183 CLR 10, where the court held that the efficacy of private arbitration could be compromised if proceedings were made public.

Another judicial test is the “reasonable purpose test,” which allows for the disclosure of confidential information if it is necessary for the establishment or protection of a party’s legal rights in relation to a third party. This test was highlighted in the context of s 27F(5) of the Commercial Arbitration Act, a provision that was also considered in Wright Prospecting.

Caselaw Shaping Confidentiality: The Interplay with Wright Prospecting

The Wright Prospecting case does not exist in a vacuum; it is part of a rich tapestry of jurisprudence on the subject of arbitration confidentiality. In *EBJ21 v EB021*, the court summarized the uniform confidentiality provisions of commercial arbitration legislation, emphasizing the importance of confidentiality but also noting that parties could opt out.

In *R v Legal Aid Board; Ex parte Kaim Todner* [1998] EWCA Civ 958; [1999] QB 966, the court emphasized that the parties’ agreement on confidentiality was not determinative, thereby preserving the court’s supervisory role. This principle was also evident in Wright Prospecting, where the court had to consider whether the orders sought were in the public interest.

The Public Interest Conundrum: Lessons from Wright Prospecting

The Wright Prospecting case serves as a poignant reminder that while the principle of confidentiality is generally upheld, there are instances where the public interest in the administration of justice may necessitate a departure from this norm. The principle of open justice was a significant consideration in the court's decision, echoing sentiments expressed in *Scott v Scott*, where the House of Lords held that the court had no power to hear a suit in camera solely based on the parties' agreement.

Conclusion

The case of *Wright Prospecting Pty Ltd v Hancock Prospecting Pty Ltd* serves as a crucial touchstone in the ongoing debate about the scope and limitations of confidentiality in arbitration proceedings. While the court upheld the general principle of confidentiality, it also made it clear that this is not an absolute right and must be balanced against other considerations, such as the public interest in open justice. This nuanced approach is consistent with earlier caselaw and provides valuable insights for parties considering arbitration as a dispute resolution mechanism.

Author: Mahmoud Abuwaseh

Title: Partner – Disputes

Email: mabuwaseh@waselandwaseh.com

Profile:

<https://waselandwaseh.com/about/mahmoud-abuwaseh/>

Lawyers and consultants.

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www.waselandwaseh.com

business@waselandwaseh.com

Legal Risk for Australian Businesses in Cross-Border

Transactions

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In the intricate matrix of cross-border legal risks, Australian enterprises are met with the most acute and perturbing challenges when they encounter situations such as insolvency, litigation, or arbitration with an international facet. However, these situations represent but a minute fraction of the total scenarios. A minuscule number of disputes possess the fortitude to bear the substantial costs and complexities linked with cross-border litigation or arbitration.

It is of note that a significant portion of the bankruptcies and insolvencies befalling the cross-border spectrum predominantly involve small-scale businesses. This is despite the fact that larger enterprises tend to be the predominant actors in the cross-border domain. The harsh realities and hardships of cross-border legal troubles disproportionately impact these smaller businesses, a factor that must not be overlooked when addressing such risks.

Given these conditions, civil remedies, which were once considered a feasible commercial option, increasingly prove to be unrealistic. The practical challenges presented by cross-border litigation have resulted in a situation where these remedies are more of an exception than a rule.

The extant mechanisms devised to tackle such complex cross-border issues exhibit an erratic and limited scope. The sporadic nature and limited efficacy of these mechanisms point towards an urgent need for a comprehensive solution. This deficiency underscores the importance of developing a robust, systematic, and consistent framework that can aid Australian

businesses in effectively managing cross-border legal risks and uncertainties, a task which is undeniably significant in today's globalised economic landscape.

Navigating cross-border legal risk

The navigation of cross-border legal risk is a delicate exercise, requiring careful consideration of a range of strategic options. These strategies often involve nuanced risk management processes tailored to the unique circumstances and risks involved.

Consider an exporter: to circumvent the risk of a buyer's default, the exporter might transfer payment risk to its bank through the use of documentary credits. This financial instrument effectively shifts the responsibility of payment to a bank, which guarantees payment as long as the exporter meets certain agreed conditions. The intricate mechanics of these instruments offer a form of insurance to the exporter, who is then able to conduct international business with lessened financial anxiety.

Similarly, joint venture arrangements may necessitate an entirely different approach. Here, a carefully crafted agreement could dictate the apportionment of distinct legal risks among the participants. For instance, one joint venture partner might assume the regulatory risks associated with a particular jurisdiction, while the other takes on the operational risks. These contractual understandings provide a foundation for the distribution of liability, allowing each party to focus on its areas of strength and expertise.

The method of foreign law impact mitigation, or "quarantining" of risk, involves designing the company structure in such a way that risk is contained within a particular subsidiary. By segregating business units or processes that are exposed to high levels of foreign legal risk, the company can effectively limit the potential exposure of its overall operations to any

detrimental legal consequences. This approach allows a firm to participate in potentially high-risk ventures without exposing the entire organization to these risks, in effect insulating the parent company and its other subsidiaries.

Yet another approach is the pricing of risk, where firms integrate the increased risk into their fees or returns. By doing so, companies essentially pass on the cost of risk management to consumers or partners. This strategy involves the careful analysis of risk profiles and potential financial impacts, balancing them against potential profits, and adjusting prices or returns accordingly. This nuanced dance requires not just a keen understanding of the legal risks involved but also astute business acumen to avoid pricing oneself out of the market.

At times, a firm may decide to accept the risk without seeking any form of recompense or protection. This is typically a calculated business decision, often made when the potential benefits far outweigh the potential losses, or when the costs of risk management strategies exceed the potential risks. This bold move requires a deep understanding of the legal landscape and potential impacts, as well as a willingness to face potentially significant consequences should the risks materialise.

Assessing cross-border legal risk

The assessment of cross-border legal risk, especially within a commercial setting, is frequently grounded in overarching beliefs and assumptions about a foreign country's legal system. The process often involves more of a reliance on heuristic understanding of a foreign legal landscape than on detailed, comprehensive analysis. Occasionally, this reliance on generalized understanding can inflate fears and lead to overestimation of risks. This emphasizes the need for a balanced approach, blending the heuristic understanding with detailed, specific analysis to avoid overcompensation for

perceived risks.

The complexity of cross-border legal risk management is further amplified when one considers the fact that the issues faced by Australian firms differ significantly depending on the countries and industries involved. Legal systems, regulatory environments, and business cultures vary widely from country to country, and what may be a significant risk in one country might be insignificant in another. Therefore, a more nuanced approach, which takes into account these variations, is necessary.

To this end, a country-by-country risk assessment approach is often appropriate. Such an approach involves identifying unique risks for each country within which Australian firms operate, and for each industry within those countries. This level of granularity enables a more targeted and effective risk management strategy, allowing firms to not only understand the risk landscape better but also develop more effective, tailored risk management strategies.

Moreover, the risk profile of an industry can vary widely from one country to another. Factors such as local regulations, cultural attitudes, and economic conditions can impact how businesses in a particular industry operate, and therefore the risks they face. Therefore, not only is it necessary to consider the risk landscape on a country-by-country basis, but also within the specific industry context within each country.

By adopting such a multifaceted approach to cross-border legal risk management, Australian firms can enhance their capacity to navigate this complex landscape. This not only safeguards their interests but also ensures their continued ability to take advantage of the opportunities afforded by engaging in international trade and investment.

Author: Mahmoud Abuwasef
Title: Partner – Disputes
Email: mabuwasef@waselandwasef.com
Profile:
<https://waselandwasef.com/about/mahmoud-abuwasef/>

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www.waselandwasef.com
business@waselandwasef.com

Adapting to Change: Key Insights for In-House Counsel from Veteran GC David Cosgrave

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David Cosgrave, Of Counsel in Australia at the law firm Wasel & Wasel, is no stranger to navigating the complex and ever-evolving legal landscape. With years of experience serving as a General Counsel (GC), he understands the unique challenges and demands of the role. In a recent interview on The Corporate Counsel Show, Cosgrave shared his insights on hiring practices, risk management, and the role of in-house counsel in sensitive legal issues.

In-House Counsel: The Evolution and the Art of Adaptability

The role of in-house counsel has evolved significantly over the years, transforming from a strictly advisory role to an integral part of strategic business decision-making. This evolution calls for a new mindset, characterized by adaptability and a deep understanding of client motivations.

Reflecting on the changes in the legal field, an expert, David Cosgrave, provides some illuminating insights. With an extensive career as a General Counsel and currently Of Counsel

at Wasel & Wasel, Cosgrave highlights that in his experience, the key to effectiveness in an in-house counsel role lies in understanding the nuances of motivations that drive various actors within an organization.

According to Cosgrave, the ability to truly comprehend the motivations of clients and stakeholders enables legal professionals to provide relevant and valuable advice. When discussing legal issues that are not part of the everyday legal spectrum, such understanding of human motivations becomes critical. The ability to balance the risk with client goals is a skill that is refined with such understanding.

For example, consider a scenario where an athlete refuses to take a drug test. A legal professional, who has a grasp of the athlete's motivations and goals, would be better equipped to provide counsel that balances legal requirements and the athlete's interests.

Moreover, this capability to adapt, to understand motivations, and to balance risks with goals is not something that is confined to dealing with exceptional situations. Cosgrave emphasizes that it is the key to delivering optimal legal advice in all situations, thus reinforcing the need for in-house counsel to develop these skills and apply them in their roles.

Adaptability also implies a willingness to embrace the constant changes that are shaping the legal profession. In-house counsel roles today demand a heightened level of agility. This evolution can be largely attributed to the rise of technology, which has brought about new trends, developments, and challenges that are transforming the legal landscape.

Understanding and adapting to these changes is not just crucial for survival; it's also the key to leveraging the opportunities that come with these transformations. As

Cosgrave articulates, the in-house counsel who manages to ride this wave of changes will have the upper hand in the new world of legal services. This adaptability may very well become the defining factor of success for in-house counsel in the years to come.

The evolving role of in-house counsel, thus, underscores the importance of a holistic approach to legal advice—one that takes into account the motivations of clients, the balancing of risk with goals, and the willingness to embrace and adapt to change.

Technological Transformations: Rising to the Challenge

The proliferation of technology in every sector has necessitated a new level of adaptability and learning for in-house counsel. These professionals now need to grasp the fundamental working of emerging technologies to deliver optimal legal advice.

David Cosgrave's experience as the first external lawyer to the first internet service provider in Australia provides a fascinating lens to this reality. Having witnessed the internet's transformative impact firsthand, Cosgrave shares that it is essential for legal professionals to keep abreast of technology's fast pace, as it profoundly impacts the legal landscape.

In addition to an understanding of the current technology, Cosgrave highlights the need for legal professionals to anticipate the impact of future technologies. For instance, the advent of large language models like GPT and its successors could further transform the legal profession. Not only can these AI models automate routine tasks, but they also raise new legal and ethical questions, thereby challenging the traditional roles and practices of lawyers.

Yet, being tech-savvy is not about engaging in a never-ending arms race with emerging technologies. According to Cosgrave,

it is more about understanding the basic principles of these technologies to navigate the legal challenges and opportunities they bring. This understanding allows legal professionals to strike a balance between leveraging technology and maintaining the human element in their work.

Cosgrave draws attention to a critical point in the discussion around technology and the legal profession – the importance of maintaining an evergreen approach. This approach means focusing on perennial principles, those that remain relevant irrespective of the technological changes. These principles, such as understanding client motivations, balancing risk and goals, and embodying adaptability, have stood the test of time and will continue to guide in-house counsel amid technological upheaval.

For example, as artificial intelligence becomes more integrated into legal processes, there may be ethical and legal considerations that challenge established norms. An evergreen approach would ensure that in-house counsel maintain professional ethics and provide sound, balanced legal advice, despite the transformative effects of technology.

In-house counsel, thus, stand at the intersection of technology and traditional legal principles. The challenge and opportunity lie in embracing technology, understanding its impact, and adapting to the changes it brings, all while staying rooted in the evergreen principles of the legal profession.

The Evolving Role of General Counsel and the Legal Technician

As we continue to navigate through the rapid changes in technology, business environments, and societal norms, the roles of General Counsel (GC) and other legal professionals are also evolving. David Cosgrave suggests a shift from the traditional legal roles to a more goal-oriented approach to better serve clients.

Cosgrave mentions a trend of decreasing tenures for GC roles, shorter than the average CEO. This trend might be attributed to various factors such as increasing demands of the role, rapid changes in the business environment, and the stresses of managing risk in uncertain times. To succeed in this ever-changing landscape, GCs must adapt to new challenges and continuously learn and grow.

The traditional approach of focusing solely on legal risk is no longer sufficient. According to Cosgrave, GCs must balance risk management with goal achievement. This balance requires understanding the business's objectives, the risks involved in achieving these objectives, and providing legal advice that guides the business towards its goals without unnecessary legal exposure.

This shift in approach is a substantial transition from the traditional risk-averse mindset, requiring GCs to don a dual hat of a lawyer and a business advisor. Thus, the GC's role is expanding from providing legal advice to becoming strategic business partners, contributing to the organization's growth and success.

Another essential aspect of this evolving role is the differentiation between a lawyer and a legal technician. Cosgrave emphasizes that this understanding is crucial for in-house lawyers to adapt to future changes. The ability to distinguish between legal advice (a lawyer's domain) and the procedural handling of legal issues (the legal technician's domain) will become increasingly important, especially with the rise of legal technology solutions.

A lawyer's role extends beyond knowing the law; it involves interpreting the law in the context of the client's situation, considering the risks and goals, and providing comprehensive advice. On the other hand, a legal technician focuses on the procedural aspects, which are increasingly being automated.

Adapting to this changing landscape requires an open mindset and a willingness to learn and grow. Embracing new technologies, adapting to new roles, and maintaining an evergreen approach to legal practice will ensure that in-house counsel continue to deliver value and effectively serve their clients.

The legal profession is at a crossroads, with exciting opportunities for those willing to adapt and grow. It is, therefore, a mix of optimism and apprehension, as GCs and other legal professionals navigate this changing landscape. But with adaptability, agility, and a focus on perennial principles, they will not only survive but thrive in this new era of law.

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

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www.waselandwaseel.com

business@waselandwaseel.com

Public procurement construction contract forms under the Austroads and the Australasian Procurement and Construction Council (APCC) Guide

August 18, 2024

The Austroads and the Australasian Procurement and Construction Council (APCC) published in 2014 the Building and Construction Procurement Guide – Principles and Options, which outlines the various standard forms of contracts for different delivery models, as well as the dispute resolution procedures available.

The most commonly used standard form of contract for major works construction is AS2124-1992. It is widely used for straightforward infrastructure projects in the civil (road and bridge) and non-residential building sectors. This contract form provides general conditions of contract that govern the rights and obligations of the parties involved. The traditional contract, which is the most common form of a construction contract, is an example of this.

In addition to AS2124-1992, other standard forms of contracts also exist. For instance, GC21 is the standard form of construction contract that is prescribed for use by NSW state agencies, and it is also used in the ACT. NPWC3-1981 is the National Public Works Committee form of contract (Edition 3), which was published in 1981 and is still in use by member agencies in the NT (both sectors) and VIC (road and bridge sector only). AS4000-1997 is the standard form that replaced AS2124-1992, but it has not been widely taken up by member agencies, particularly in the civil (road and bridge) sector.

Another delivery model is the design and construct (D&C) contract form, which is commonly used in D&C projects. AS4300-1995 is the most commonly used standard form of contract for this delivery model. However, other jurisdictions use agency templates or custom-designed agreements, such as GC21, NPWC3-1981, or modified versions of AS2124-1992.

Construction management is another delivery model used in the non-residential building sector. Modified versions of

AS4916-2002 or AS2124-1992 are used in various jurisdictions. VIC agencies use either amended Department of Health construction management contracts or custom-designed agreements. In the civil (road and bridge) sector, construction management has only been used for road and bridge works procurements in the ACT, with a custom-designed agreement based on a standard 'Project Management Agreement' (PMA) being the form of contract.

The managing contractor delivery model is commonly used in the non-residential building sector. Modified versions of GC21 are used by NSW, SA, and the ACT. Other jurisdictions use agency templates or custom-designed agreements, such as the 'Managing Contractor Design and Construction Management' contract, which is the most common form of contract used for this delivery model in QLD. In the civil (road and bridge) sector, the managing contractor delivery model is currently only used in the NT, along with one previous use in VIC, supported by custom-designed agreements.

Direct managed arrangements in the construction industry utilize many different styles of contracts, predominantly short-form in-house trade agreements. Standard forms of contracts are not available for the Early Contractor Involvement (ECI) delivery model. However, some jurisdictions, such as QLD and WA, have their own form of contract based on two separate agreements for Stages 1 and 2, which have been extensively tailored on a case-by-case basis to meet the requirements of each project.

The alliance delivery model has a template 'Project Alliance Agreement', which was recently released by the Department of Infrastructure and Transport, to be used as the basis for contract documentation for all alliances, unless prior approval is given. For public-private partnership (PPP) delivery models, high-level commercial principles are described in the National Public Private Partnership Policy and Guidelines, which must be taken into account by member

agencies as part of the drafting process for any standard or custom-designed PPP contracts. PPPs are outcome-based rather than prescriptive with respect to specifications, performance standards, etc., and as such, standard forms of contract are not available. However, agencies may have their own form of contract, such as in NSW, where the member agency utilizes in-house template PPP or Build Own Operate Transfer (BOOT) deeds customized to accommodate project requirements.

Professional services arrangements in the construction industry are based on various forms of contracts, depending on the jurisdiction. AS4122-2010 is used by two jurisdictions (SA and TAS) as the basis for their professional services arrangements. The TAS agency also uses a whole-of-government 'Standing Offer for Services' form of contract for panel arrangements. The WA agency uses the 'Request Conditions and General Conditions of Contract' (2012), which is a document by the Government of Western Australia, Department of Finance. The remaining member agencies have their own standard in-house forms of contracts, which are tailored for each procurement. APCC member agencies use a mixture of AS4122 (2000 and 2010 versions), agency templates, and custom-designed agreements to secure their professional services arrangements.

Dispute resolution procedures in the construction industry in Australia are available to parties to help resolve disputes that may arise during the course of a project. These procedures aim to provide an efficient and cost-effective way to resolve disputes, without resorting to litigation. There are several dispute resolution procedures available, including negotiation, mediation, arbitration, and litigation.

The construction industry in Australia has various standard forms of contracts for different delivery models, which provide guidance on the contractual arrangements between the parties involved in the project. AS2124-1992 is the most commonly used standard form of contract for major works construction, but other standard forms of contracts also

exist. Dispute resolution procedures, such as negotiation, mediation, arbitration, and litigation, are available to parties to help resolve disputes that may arise during the course of a project. By understanding the various contract forms and dispute resolution procedures available, parties can work together more effectively, and disputes can be resolved efficiently and effectively.

Author: Mahmoud Abuwaseel

Title: Partner – Disputes

Email: mabuwaseel@waselandwaseel.com

Profile:

<https://waselandwaseel.com/about/mahmoud-abuwaseel/>

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www.waselandwaseel.com

business@waselandwaseel.com

Australia FIRB commercial land foreign investment guidance 2023

August 18, 2024

Overview

In January 2023, the Foreign Investment Review Board issued a series of guidance notes to assist investors and stakeholders in their engagement with foreign investments in Australia. As a foreign investor, it is crucial to understand the intricacies of the Australian Foreign Acquisitions and Takeovers Act 1975, which requires foreign persons seeking to acquire an interest in commercial land to obtain foreign investment approval.

Developed commercial land has a monetary threshold of \$310

million, while sensitive commercial land has a threshold of \$67 million. However, if the foreign person is from a certain free trade agreement partner, the threshold is \$1,339 million, regardless of the land's sensitivity. It is important to note that even if the proposed investment falls below the monetary threshold, foreign investment approval is still required if the land is considered "national security land."

Commercial land is defined as land in Australia, including any building on the land, or the seabed of the offshore area, other than land used wholly and exclusively for a primary production business or land on which the number of dwellings that could reasonably be built is less than 10. For an acquisition of vacant commercial land to be approved, it is generally conditional on the land being put to productive use within a reasonable timeframe. Additionally, an exemption certificate covering acquisitions of vacant commercial land for the purpose of undertaking a primary production business or residential development is conditional on Australian investors having an equal opportunity to invest in that land through an open and transparent sale process.

Foreign persons must keep records relating to certain actions concerning their foreign investment for up to five years. Applications for foreign investment approval must be submitted electronically on the Foreign Investment Review Board (FIRB) website and are supported by further guidance. A fee is payable for all foreign investment applications.

Breaches of foreign investment law may attract significant penalties, including infringement notices, civil, and criminal penalties. However, Part 3 of the Foreign Acquisitions and Takeovers Regulation 2015 provides a number of exemptions where an acquisition of commercial land may not be considered a notifiable action, a significant action, and/or a notifiable national security action, and may thus not need to be notified to the Treasurer.

Foreign persons must not take a notifiable and significant action or a notifiable national security action until they have received foreign investment approval for that proposed action. A proposed investment will be screened for foreign investment approval under the national interest test if it is a notifiable and significant action. If the proposed investment is a notifiable national security action and not also a significant action, it will be screened under the narrower national security test.

The Treasurer has the power to make a range of orders in relation to a significant action that a person is proposing to take or has already taken, even if they do not inform the Treasurer about it. Certain foreign investments that are not notifiable actions or notifiable national security actions may be reviewable national security actions. Where a reviewable national security action is not notified to the Treasurer, the action may be called-in for review if the Treasurer considers that the action may pose a national security concern. Foreign persons can choose to extinguish the Treasurer's call-in power by voluntarily notifying reviewable national security actions. The National Security Guidance Note outlines investment areas that may raise national security concerns, where investors are therefore encouraged to voluntarily notify.

Understanding these guidance notes is crucial for any foreign investor looking to engage in commercial land investments in Australia. Ensuring that all necessary steps are taken to comply with foreign investment approval requirements will mitigate the risk of incurring penalties or having investments called-in for review.

Thresholds for commercial land investments

When it comes to investing in commercial land in Australia, foreign persons are required to obtain foreign investment approval, and the monetary threshold for such investments is based on the consideration for the investment, not the value

of the land. The applicable threshold is dependent on whether the land is vacant or developed, whether it is considered sensitive land, the nationality of the investor, and whether the foreign person is a foreign government investor.

For foreign government investors, there is a \$0 threshold for all types of commercial land. Private investors from certain free trade agreement (FTA) partners, except Hong Kong, have a \$0 monetary threshold for investment in vacant commercial land and a \$1,339 million threshold for investment in developed commercial land. For private investors from Hong Kong, there is a \$0 threshold for investment in vacant commercial land, a \$67 million threshold for investment in sensitive developed commercial land, and a \$1,339 million threshold for investment in developed (non-sensitive) commercial land.

For private investors from India, the threshold is \$500 million for investments in developed (non-sensitive) commercial land acquired predominantly for the supply of a service through a commercial presence in Australia. All other private investors have a \$0 threshold for investment in vacant commercial land, a \$67 million threshold for investment in sensitive developed commercial land, and a \$310 million threshold for investment in developed (non-sensitive) commercial land.

For all investments in national security land, the monetary threshold is \$0, regardless of the investor. Commercial land is considered vacant commercial land if there is no substantive permanent building on the land that can be lawfully occupied by persons, goods, or livestock.

Vacant commercial land investments

As part of the national interest test, the Treasurer will generally ensure that vacant commercial land is put to productive use within a reasonable timeframe and that 'land banking' does not occur. If an application for vacant

commercial land is approved, it will generally be subject to conditions such as the land being developed, continuous construction of the proposed development commencing within five years of completing the purchase of the land, and the land not being sold, transferred, or otherwise disposed of before the development is completed.

Foreign persons must not dispose of the land until construction is complete, but the sale of a completed stage of the development and the sale of blocks within a newly developed subdivision are exceptions. These development conditions ensure that 'land banking' does not occur, and the land will be put to productive use. The conditions imposed will be considered on a case-by-case basis to ensure that they do not unduly hinder the legitimate commercial practices of the proposed investment while still ensuring that the land is put to productive use.

Developed commercial land investments

Foreign investment in commercial land that is already developed and has a substantive permanent building on it is subject to stricter screening procedures, especially if the land is deemed sensitive or hosts critical infrastructure. In Australia, developed commercial land is defined as any commercial land that is not vacant and is legally fit for occupancy by people, goods, or livestock. Such land is often used for industrial, commercial, or residential purposes.

The screening of foreign acquisitions of developed commercial land depends on various factors, such as the kind of business it is used for, the nationalities of the investors, and whether the land is classified as sensitive or not. If any of the above mentioned factors apply, a lower monetary screening threshold will apply.

For example, if a foreign person intends to acquire commercial land that will be leased to the Commonwealth or any other

government body, the screening process will be stricter. Similarly, if the land is going to be used for sensitive purposes such as uranium extraction, nuclear operations, or the storage, handling, or disposal of security-sensitive biological agents, the screening will be more stringent. Other critical infrastructure uses such as public infrastructure, telecommunications networks, and storage of critical servers for financial institutions also attract tighter scrutiny.

The screening process aims to ensure that foreign investments in sensitive or critical commercial land do not pose a risk to Australia's national interest. This is achieved through various measures such as limiting foreign ownership and control of critical infrastructure, ensuring land is put to productive use within a reasonable time frame, and preventing "land banking" or holding onto land without developing it. The specific conditions and restrictions will vary based on the circumstances of each investment and the degree of sensitivity of the land.

Exemption certificates for commercial land

Foreign persons seeking to make multiple acquisitions of commercial land in Australia can streamline the approval process and reduce regulatory burden by applying for a Land Exemption Certificate under section 58 of the Foreign Acquisitions and Takeovers Act 1975. This certificate grants up-front approval for a program of acquisitions, eliminating the need to seek separate individual approval for each investment. However, a financial limit will apply to all exemption certificates, which will be determined on a case-by-case basis.

While exemption certificates are a beneficial mechanism for foreign investors, it is important to note that the standard conditions applying to acquisitions of vacant commercial land, such as commencing development within five years, will continue to apply regardless of whether the land was acquired

through an individual no objection notification or an exemption certificate.

Exemption certificates are generally issued for 12 months to first-time exemption certificate holders, and longer durations may be considered for investors who have a demonstrated compliance history with the foreign investment framework. However, it is worth noting that exemption certificates are intended for foreign persons proposing to engage in a high volume of acquisitions. As such, a certificate will not usually be granted where the number of likely acquisitions is small and it would be reasonable for the foreign person to notify them separately.

In cases where a program of land acquisitions may include land that is 'national security land' or may otherwise give rise to national security concerns, foreign persons can also apply for a National Security Exemption Certificate under sections 43BA and 43BB of the Foreign Acquisitions and Takeovers Regulation 2015. These exemption certificates can cover acquisitions of land that are otherwise notifiable national security actions and reviewable national security actions. However, before granting one of these exemption certificates, the Treasurer must be satisfied that the taking of the action or kinds of actions by the foreign person would not be contrary to Australia's national security.

Author: Mahmoud Abuwaseh

Title: Partner – Disputes

Email: mabuwaseh@waselandwaseh.com

Profile:

<https://waselandwaseh.com/about/mahmoud-abuwaseh/>

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