

IN THE SUPREME COURT OF VICTORIA
COMMERCIAL COURT
TECHNOLOGY, ENGINEERING AND CONSTRUCTION LIST

Not Restricted

S ECI 2025 02180

BUILT PTY LTD (ACN 083 928 045)

Plaintiff

v

VICTORIAN CORRECTIONAL
INFRASTRUCTURE PARTNERSHIP PTY LTD
(ACN 107 247 067)

Defendant

JUDGE: Nichols J
WHERE HELD: Melbourne
DATES OF HEARING: 24, 25 September 2025; 13 October 2025 (submissions)
DATE OF JUDGMENT: 3 March 2026
CASE MAY BE CITED AS: Built Pty Ltd v Victorian Correctional Infrastructure
Partnership Pty Ltd
MEDIUM NEUTRAL CITATION: [2026] VSC 76

CONTRACTS – Construction of building contracts – Construction of contractual notices – Where a subcontract contained a clause purporting to suspend downstream Linked Claims and Linked Disputes pending the resolution of Linked Claims and Linked Disputes upstream under a head contract – Whether the subcontractor had made Linked Claims and whether they remained in existence – Whether disputes identified in a notice of dispute issued by the contractor identified Linked Claims or Linked Disputes – *Alphington Developments Pty Ltd v Amcor Pty Ltd* [2025] VSCA 48, referred to – Held that Linked Disputes identified in the contractor’s notice of dispute remained extant – Application dismissed.

CONTRACTS – Construction of building sub-contract – Security of payment – Whether a provision of the subcontract was rendered of no effect by reason of s 13 of the *Building and Construction Industry Security of Payment Act 2002* (Vic), or void by reason of s 48 – Where there was no payment claim on foot – *Maxcon Constructions Pty Ltd v Vadasz* (2018) 264 CLR 46, *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd* [2021] VSC 807, referred to – *JG King Project Management Pty Ltd v Hunters Green Retirement Living Pty Ltd* (2024) 77 VR 406, *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, referred to – Held that s 13 did not apply in the absence of a payment claim – Held that it would not be a proper exercise of discretion to declare the contractual provision void under s 48 on a basis divorced from any factual dispute – Application dismissed.

PRACTICE AND PROCEDURE - Declarations - Whether declaratory relief should be granted pursuant to the *Supreme Court Act 1986* (Vic), s 36 - Where declarations sought in hypothetical circumstances - *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 - *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 - *Ansett Australia Ground Staff Superannuation Fund Pty Ltd v Ansett Australia Ltd* (2003) 176 FLR 393, followed - Held that declaratory relief refused as it was divorced from the facts and hypothetical - Declaration refused.

APPEARANCES:

Counsel

Solicitors

For the Plaintiff

ND Hopkins KC with
BG Mason

Corrs Chambers Westgarth

For the Defendant

CP Young KC with
CJ Hender

Pinsent Masons

TABLE OF CONTENTS

PART A – Introduction.....1

PART B – Linked Claims and Linked Disputes.....3

Contractual provisions3

The alleged Linked Claims14

Surrounding Context – Dealings between the parties15

Built’s Submissions32

VCIP’s Submissions38

Consideration.....45

 Contractual provisions.....46

 March 2025 NOD Linked Claims and Disputes.....54

 Linked Claims55

 Linked Disputes.....56

 Linked Disputes – as at September 2025.....63

Part C – Sections 13 and 48 of the SOP Act64

The SOP Act, s 13.....64

Consideration.....67

The SOP Act, s 48.....71

Consideration.....74

HER HONOUR:

PART A – Introduction

- 1 The defendant, Victorian Correctional Infrastructure Partnership Pty Ltd (**VCIP**, or the **contractor**) is responsible for delivering the prison infill expansion program at the Metropolitan Remand Centre under its contract with the **State** of Victoria dated 30 November 2021 (**Head Contract**).¹ VCIP is a special purpose vehicle created for that project. It entered into a sub-contract dated 3 December 2021 (**Construction Contract**) with the plaintiff, Built Pty Ltd (**Built**, or **construction contractor**), for the design and construction work which it agreed to undertake by the Head Contract.²
- 2 The **Works**³ under the contracts included the installation of modular cells which were to be procured by the State, designed and manufactured under a separate contract with a third party, and installed by Built.
- 3 In 2023, a dispute arose regarding alleged defects in modular cells. The State alleged that VCIP was responsible for non-complaint works including defects in the modular cells. On 7 March 2025, the State issued a notice of dispute to VCIP under the Head Contract concerning the alleged defects and the contractual consequences that followed, including a failure to reach practical completion on time. The dispute that was the subject of that notice has proceeded to arbitration.
- 4 On 14 March 2025, VCIP issued a notice of dispute (**March 2025 NOD**) to Built under the Construction Contract, largely regarding the same alleged defects, to the same effect as the State's notice. The March 2025 NOD is the subject of this proceeding. The NOD made allegations about Built's failure to comply with directions to fix the defects, failure to reach practical completion, and its liability to pay damages to VCIP. The notice stated:

¹ VCIP entered into an augmentation order with the State on or about 30 November 2021 for delivery of the prison infill expansion program at the Metropolitan Remand Centre, which attached an amended Facility Services Agreement and a Head Construction Contract.

² The **Principal** under each contract is the Minister for Corrections of the State of Victoria for and on behalf of the Crown in right of the State of Victoria.

³ The definition of the Works in both the Construction Contract and Head Contract were substantially the same.

The matters raised by this notice concern Linked Claims and give rise to Linked Disputes.

Accordingly, in accordance with clause 48A.4(b), the Linked Disputes will not be progressed under the Construction Contract while the Linked Dispute is being resolved between the State and the Contractor under the Head Construction Contract, and the running of time under, and the parties' obligations to comply with, the relevant provisions of the Construction contract to which the Linked Dispute relates are suspended.

5 By cl 48A, the Construction Contract provided a regime for the resolution of 'Linked Claims' and 'Linked Disputes'. Broadly put, Linked Claims were claims or entitlements 'by' or 'of' Built against VCIP. They have a relationship with upstream claims or decisions (discussed below). Under cl 48A, Linked Claims were pursued upstream by VCIP with the State (or other relevant upstream party). Built was obliged to assist VCIP in the pursuit of those claims and was bound by the outcome of any determination or resolution of a Linked Claim or a Linked Dispute between VCIP and the upstream party. A Linked Dispute was one that 'relates to any dispute arising out of or in connection with a Linked Claim', to which Built is a party, or which it has initiated.

6 In this proceeding Built seeks declarations:⁴

- (a) That the claims described in the [March 2025 NOD] were not as at 14 March 2025, and are not as at 25 September 2025, 'Linked Claims' within the meaning of that term in the Construction Contract, and cl 48A of the Construction Contract has no effect in relation to the claims so described.
- (b) That the disputes described in the [March 2025 NOD] did not as at 14 March 2025, and do not as at 25 September 2025, relate to any disputes arising out of, or in connection with, any 'Linked Claims', and therefore are not 'Linked Disputes', within the meaning of those terms in the Construction Contract, and cl 48A of the Construction Contract has no effect in relation to the disputes so described.
- (c) Alternatively:
 - (i) That the claims described in the [March 2025 NOD] are not as at 25 September 2025 'Linked Claims' within the meaning of that term in the Construction Contract, and cl 48A of the Construction Contract has no effect in relation to the claims so described; and

⁴ The form of relief ultimately sought was varied by Built during the hearing of the proceeding and was in a different form from that originally sought.

- (ii) That the disputes described in the [March 2025 NOD] do not as at 25 September 2025 relate to any disputes arising out of, or in connection with, any 'Linked Claims', and therefore are not 'Linked Disputes', within the meaning of those terms in the Construction Contract, and cl 48A of the Construction Contract has no effect in relation to the disputes so described.
- (d) Alternatively, clause 48A of the Construction Contract is of no effect in relation to any 'Linked Claims' or 'Linked Disputes' described in the [March 2025 NOD] by reason of section 13 of the Building and Construction Industry Security of Payment Act 2002 (Vic) [the **SOP Act**], or clause 48A of the Construction Contract is [or alternatively, clauses 48A.2, 48A.4, 48A.5 and 48A.6 of the Construction Contract are] void by reason of section 48 of that Act.
- (e) Clause 47 of the Construction Contract applies to the dispute the subject of the [March 2025 NOD].

7 The dates captured by the proposed declarations are the date of the March 2025 NOD and the date of the trial of this proceeding. Shortly put, Built seeks to avoid the application of cl 48A of the Construction Contract to the disputes and claims described in the March 2025 NOD.

8 For the reasons that follow Built's application for declaratory relief is refused.

PART B – Linked Claims and Linked Disputes

Contractual provisions

9 While the dispute concerns the construction and application of cl 48A and related defined terms, other contractual provisions are relevant contextually. The Construction Contract contained terms as follows or to the following effect.

10 Several provisions made explicit reference to the Head Contract and other 'upstream documents':

- (a) The upstream documents included the independent certifier deed of appointment and independent expert deed. VCIP and the State were parties

to the upstream documents. Built was a party to some, but not all, of those documents.⁵

- (b) By cl 3A.2, Built was required to ensure that it would not cause or contribute to any breach by VCIP of its obligations under any of the upstream documents, and to indemnify VCIP against any losses suffered or claims brought against it arising out of, or in connection with, any breach of that clause.
- (c) Clause 3A.3 provided that if VCIP received an upstream instruction⁶ and there was a corresponding provision in the Construction Contract in respect of the works or Built's obligations under the Construction Contract, VCIP was entitled to give Built a corresponding instruction insofar as was necessary to give effect to the upstream instruction. Built must comply with the instruction to the extent applicable to its obligations under the Construction Contract, and Built's entitlement (if any) as a result of complying with such an instruction was subject to cls 48A.5 and 48A.6. Clause 3A.3 further provided that where VCIP's consent, approval, decision or opinion was required under the Construction Contract in relation to a matter in respect of which there was a corresponding provision in an upstream document where the approval, decision or opinion of an upstream party was required, VCIP will be deemed to act reasonably under the Construction Contract if it acts in accordance with the upstream party's decision to give or not give such consent, approval, decision or opinion, or to act in accordance with such decision or opinion.
- (d) By cl 25A a project works committee, comprising representatives of the Principal and VCIP, was to be constituted and meet regularly to monitor progress of the works and to discuss issues arising between the parties in

⁵ For the purposes of the Construction Contract the independent certifier was to be appointed by the Principal. The independent certified deed of appointment was between the Principal, VCIP and the independent certifier. The Principal, VCIP, Built and the independent certifier entered into the independent certifier side deed. The Principal entered into the independent expert deed, which was acceded to by VCIP and Built (cl 2).

⁶ An instruction given by an Upstream party to VCIP in accordance with the provision of an Upstream document with which VCIP is obliged to comply under that document (cl 2).

connection with the works or the Construction Contract before referring them for dispute resolution under cl 47 or the independent expert deed (among other things). Built's representative was required when requested to attend meetings of the committee.

11 The Construction Contract contained detailed provisions in respect of the modular cells.⁷ Built was to deliver to site and install modular cells as part of the contract works. Among other things:

- (a) VCIP was to use reasonable endeavours to ensure that the Principal procured that the modular cells would be completed in accordance with the requirements for their design, manufacture and supply.⁸ Clause 11(b) provided that when the Principal was of the opinion that each modular cell has been manufactured in accordance with the modular cell requirements, the Principal would issue a certificate to that effect. By cl 8.12, VCIP was required to ensure that the Principal procures from the modular cell manufacturer a warranty in the name of Built that the modular cells have been manufactured in accordance with the modular cell requirements and the modular cell contract with the manufacturer.
- (b) Clause 8.11(i) provided that subject to the 'contractor's FFP (fit for purpose) risk' and the contractor's 'FRR (functional requirements) risk', as between VCIP and Built, Built accepted all risk in respect of a modular cell upon executing a statement of delivery. Where Built has executed a statement of delivery, Built was not entitled to make any claim against VCIP, VCIP would have no liability to Built and Built will not be relieved from any of its obligations under the contract in connection with a defect (including any latent defect) in any modular cell, or of any failure in any modular cell to meet the modular cell requirements.

⁷ What follows is a summary of the provisions concerning the modular cells which are of contextual relevance only.

⁸ The Construction Contract, cl 8.11.

(c) The carve-outs from Built's acceptance of risk in relation to the modular cells were the FFP and FRR risks assumed by VCIP. Clause 8.8 provided that VCIP would not be entitled to make any claim against Built and Built would have no liability to it for breach of a 'fit for purpose obligation' where the reason for the breach of the obligation was that there were deficiencies in the modular cell design and, as a consequence of such deficiencies, the modular cells were not fit for the purpose of accommodating prisoners in accordance with the contractor's functional requirements. Clause 8.4(i)(iv) provided, subject to a number of caveats, that VCIP will not be entitled to make any claim against Built and Built will have no liability to it for any claim (made by VCIP) that the relevant part of the works that are the subject of the design documents do not meet the contractor's functional requirements.

- 12 On around 23 November 2022, the State sent a letter to VCIP to vary the Head Contract relating to the handover of modular cells from the manufacturer. VCIP sent like correspondence to Built varying the Construction Contract to reflect the altered handover arrangements. In substance, the parties acknowledged that the modular cells may be handed over to Built for installation notwithstanding defects, but that VCIP remained responsible for ensuring that the State paid for the manufacturer to rectify those defects.
- 13 On 28 June 2023, the State, VCIP and Built entered into a deed which, among other things, amended the Construction Contract and Head Contract to extend the relevant date for Practical Completion to 30 November 2023.
- 14 In relation to defective work generally, cl 30.3 provided that if the independent certifier or VCIP's representative discovers material or work provided by Built not in accordance with the Construction Contract, they may direct Built to remove, demolish, redesign, reconstruct, replace or correct the work. Under cls 30.4 and 30.5, instead of a direction, VCIP's representative may direct a variation under cl 40 or elect to accept the work. Clause 30.7 made provision for Built to disagree with

directions by the independent certifier or VCIP with a dispute resolution process, ultimately governed by cl 47 (below).

- 15 The Construction Contract made detailed provision for extensions of time for practical completion, including defining the circumstances in which Built shall be entitled to an extension of time and where it shall not be entitled.⁹ Built would become indebted to VCIP for liquidated damages at the specified rate where it failed to reach practical completion by the stipulated date. Clause 36 provided for the payment of extra costs to Built in respect of defined delays or disruptions.
- 16 Clause 40 provided that VCIP's representative may direct Built to change or execute certain works (variations). Built was not permitted to vary the works, except as directed by VCIP under cl 40.
- 17 The contract provided a detailed regime for Built claiming progress payments.¹⁰ Built was entitled to make claims, subject to satisfaction of certain conditions precedent, on the dates or stages set out. On receipt of a payment claim, the independent certifier was to review the claim and provide an opinion to both parties. Its representative would then assess the claim and issue a payment schedule setting out the amount to be made by VCIP or Built. Clause 42.1(y) provided that upon the issue of a tax invoice, and subject to the contract, 'the contractor shall pay to the construction contractor, or the construction contractor shall pay to the contractor as the case may be, an amount not less than the amount shown in such certificate as due to the construction contractor or the contractor as the case may be'. Clause 53 applied various procedural mechanisms relevant to the application of the *Building and Construction Industry Security of Payment Act 2002* (Vic) (the **SOP Act**).
- 18 Clause 46.1 covered the communication of claims by Built in respect of or arising out of a breach of the Construction Contract or arising out of or related to the works, stipulating that VCIP shall not be liable for any claim by Built unless, within 15 business days, after which a competent and experienced contractor could

⁹ The Construction Contract, cls 35.5 and 35.6.

¹⁰ The Construction Contract, cl 42.

reasonably have been aware of the circumstances which might give rise to any such claim, Built had given to VCIP and the independent certifier a prescribed notice. Once notice was given, the contractor's representative was to assess the claim within the time stipulated.

19 A dispute resolution mechanism was provided by cl 47. Clause 47.1 provided that if a dispute or difference between Built and VCIP arose in connection with the Construction Contract, or the subject matter thereof, including in connection with a Claim (with certain exclusions) (**dispute**) then either party shall deliver to the other and to the independent certifier a notice of dispute. Notwithstanding the existence of a dispute, VCIP and Built shall continue to perform the Construction Contract. The clause stated '*if the Notice of Dispute is for a Linked Claim, clause 48A shall apply*'.

20 The dispute resolution process provided by cl 47 provided for a good faith conferral between the parties' senior representatives, followed by an expert determination that was to be binding subject to certain carve-outs allowing for litigation. Each step was subject to stated time limits.

21 Clause 48A provided for 'Linked Claims and Linked Disputes' as follows:

48A.1 Linked Claims and Linked Disputes

Despite Clause 47, if the Construction Contractor intends to or does make a Claim against the Contractor and that Claim is a Linked Claim, this Clause 48A shall apply and the Construction Contractor must:

- (a) notify the Contractor in writing of the Linked Claim, including:
 - (i) reasons as to why the Claim is a Linked Claim for the purposes of this clause 48A and is bona fide;
 - (ii) details of the Linked Claim; and
 - (iii) details of the effect such Linked Claim is having or will have on the Construction Contractor, to the extent reasonably practicable;
- (b) submit to the Contractor all notices and documents in respect of the Linked Claim required by this Construction Contract (including for each Claim, notices of Dispute and notices provided under Clause 46) to the extent required under the Upstream Document at that time, in a form that complies with this Construction Contract;

- (c) without limiting Clauses 48A.1(a)(i) or 48A.1(a)(ii), submit to the Contractor draft notices and documents in respect of the Linked Claim required by the Contractor and take all proper and reasonable steps to assist the Contractor to pursue the Linked Claim within the timeframes required under the Upstream Document;
- (d) co-operate with, and take all proper and reasonable steps to assist, the Contractor's pursuit of the Linked Claim under the Upstream Document within the timeframes required under the Upstream Document;
- (e) provide all information reasonably required to pursue the Linked Claim in a clear and transparent manner, which may include the Construction Contractor providing a breakdown of the calculation of all relevant preliminaries, labour, equipment, materials, subcontract and other costs of the Construction Contractor and its Associates and other information reasonably requested by the Contractor's Representative, the Contractor or an Upstream Party including reasonably available source documents required to verify such calculation; and
- (f) to the extent that it issues general correspondence to the Contractor in respect of a Linked Claim and it wishes the Contractor to provide such correspondence (or the content of such correspondence) to an Upstream Party in discharging its obligation under clause 48A.1(d), submit to the Contractor draft correspondence for provision to the Upstream Party,

(Linked Claim Documents).

48A.2 Construction Contractor's failure to comply

If the Construction Contractor fails to comply with this Clause 48A.2 (including by failing to provide Linked Claim Documents to the Contractor or by providing Linked Claim Documents to the Contractor which fail to comply with this Construction Contract, and to the extent applicable, the Upstream Document) or any other provision of this Construction Contract which imposes more specific obligations on the Construction Contractor in respect of a Linked Claim and as a consequence the Contractor's Entitlements under the Upstream Document are reduced or extinguished, the Construction Contractor's Entitlement in respect of its Linked Claim shall be reduced or extinguished to the same extent.

48A.3 Contractor's obligations in respect of Linked Claims

In pursuing a Linked Claim with the Principal, the Contractor will:

- (a) reasonably consider all submissions of the Construction Contractor in relation to the relevant Claim;
- (b) act in good faith in resolving and settling such Claim;
- (c) keep the Construction Contractor informed of the progress of the relevant Claim;

- (d) consult with the Construction Contractor in relation to the manner in which the Contractor pursues the Claim from time to time;
- (e) where permitted by the Upstream Party, allow the Construction Contractor to participate in meetings, discussions and negotiations in relation to the Claim;
- (f) promptly notify the Construction Contractor upon, and provide details in relation to, the resolution of the Linked Claim with the Upstream Party; and
- (g) will not agree or settle a Linked Claim with the Upstream Party without the prior consent of the Construction Contractor, which consent must not be unreasonably withheld or delayed.

The Contractor will not:

- (h) be obliged to submit a Linked Claim to the Upstream Party; or
- (i) incur any liability to the Construction Contractor,

where:

- (j) the Linked Claim Documents, information or claim documentation provided by the Construction Contractor fails to comply with the requirements of this Construction Contract; or
- (k) it considers, acting reasonably, that the claim notified by the Construction Contractor is vexatious, frivolous or not bona fide.

48A.4 Linked Disputes

The parties acknowledge and agree that

- (a) except where expressly provided otherwise in this Construction Contract, Linked Disputes must be conclusively resolved under and in accordance with the dispute resolution processes agreed between the Contractor and the Upstream Party under the relevant Upstream Document; and
- (b) except where expressly provided otherwise in this Construction Contract, to the extent a dispute is a Linked Dispute, a Linked Dispute will not be progressed under this Construction Contract while the Linked Dispute is being resolved between the Contractor and the Upstream Party, and the running of time under, and the parties' obligations to comply with, the relevant provisions of the Construction Contract to which that Linked Dispute relates, will be suspended.

48A.5 Determination of Linked Claims and Linked Disputes

The Construction Contractor agrees:

- (a) to accept in full satisfaction of any Claim and/or dispute to which this Clause 48A applies, the relevant proportion or the Entitlement agreed or settled by the Contractor in respect of the Contractor's Linked

Claim and/or Linked Dispute with the Upstream Party that applies to the Construction Contractor's Claim under this Clause 48A;

- (b) to be bound and abide by the outcome of any binding resolution, settlement, determination or award reached or agreed to by the Upstream Party and the Contractor in respect of any Linked Claims and/or Linked Disputes (including pursuant to any dispute resolution procedures);
- (c) that to the extent that the Construction Contractor has recovered in respect of a Linked Claim and/or Linked Dispute under a clause of this Construction Contract, the Construction Contractor is not entitled to the same compensation under any other clause in respect of that Linked Claim or to bring any Claims against the Contractor in respect of such a Linked Claim and/or Linked Dispute under this Construction Contract or otherwise at law; and
- (d) to pay to the Contractor promptly any reasonable costs incurred by the Contractor (including adverse costs orders, awards and judgments) in submitting and pursuing a Linked Claim or Linked Dispute in accordance with Clause 48A to the extent to which the Linked Claim or Linked Dispute is for the benefit of the Construction Contractor.

48A.6 Limited Liability in respect of a Linked Claim

Except where expressly provided otherwise in this Construction Contract, to the extent that a Claim by the Construction Contractor against the Contractor is a Linked Claim then:

- (a) the Contractor's Liability to the Construction Contractor in respect of that Claim is limited in accordance with this Clause 48A;
- (b) the Construction Contractor's Entitlement under this Construction Contract or otherwise at law will be limited to the relief actually granted, or compensation paid, to the Contractor by an Upstream Party, and as determined in accordance with any dispute resolution procedures between the Contractor and an Upstream Party under an Upstream Document;
- (c) if the Contractor receives a payment from the Upstream Party in full settlement of a Linked Claim, the Contractor's liability to the Construction Contractor in respect of that Claim is satisfied and discharged in full by the Contractor conferring on the Construction Contractor the Linked Entitlement in accordance with this Clause 48A; and
- (d) if the Contractor does not receive an Entitlement from the Upstream Party in relation to a Linked Claim, the Contractor's Liability to the Construction Contractor in respect of that Claim is deemed to be satisfied on the determination of that matter under the Upstream Document.

The Contractor's Liability and the Construction Contractor's Entitlements in connection with a Linked Claim and/or a Linked Dispute will be reduced:

- (e) to the extent that the relevant Claim and/or dispute is caused or contributed to by an act or omission of the Construction Contractor;
- (f) to the extent arising from a failure by the Construction Contractor or its Associates to perform the Works in accordance with this Construction Contract;
- (g) to the extent the Construction Contractor, or any of its Associates, fails to use all reasonable endeavours to mitigate, minimise or avoid the effects, costs, consequences or duration of the relevant Claim and/or dispute (including by putting in place temporary measures reasonably required by the Contractor); and
- (h) by any insurance proceeds paid, payable, or which would have been payable to the Construction Contractor or any of its Associates in accordance with any insurances but for any failure by the Construction Contractor or any of its Associates to effect and maintain any insurances in accordance with this Construction Contract, the terms of those insurances or to make or pursue a Claim under any insurances.

This Clause 48A does not create any new Entitlement of the Construction Contractor that the Construction Contractor would not have had but for this Clause 48A.

22 The following terms were defined:

'Linked Claim' means any Claim or potential Claim by, or Entitlement or potential Entitlement of the Construction Contractor against the Contractor under and in accordance with this Construction Contract where the Claim or potential Claim, Entitlement or potential Entitlement:

- (a) arises out of or is in respect of the same or substantially similar facts or circumstances, actions or omissions as a Claim or potential Claim by, or Entitlement or potential Entitlement of, the Contractor against an Upstream Party arising out of or in connection with the PIE Program or an Upstream Document (even if the Claim, potential Claim or Entitlement or potential Entitlement is expressed in different terms or grounds and whether or not the Contractor's Claim, potential Claim, Entitlement or potential Entitlement encompasses more or less than a part of the Claim, potential Claim, Entitlement or potential Entitlement of the Construction Contractor);
- (b) is a Linked Dispute; or
- (c) arises out of or in connection with an Upstream Decision,

but which excludes Claims arising out of, or in connection with:

- (d) any breaches of this Construction Contract by the Contractor to the extent not caused, or contributed to, by breaches by an Upstream Party under an Upstream Document;
- (e) any disputes regarding the Contractor's recourse to Security but excluding where the Principal requires the Contractor to call on Security in accordance with Clause 5.8; and
- (f) variations directed by the Contractor for which the Principal has not directed a 'variation' (as that term is defined in the Head Contract) under the Head Contract;

'Linked Claim Document' has the meaning given in Clause 48A.1;

'Linked Dispute' means a dispute which:

- (a) the Construction Contractor has initiated or to which the Construction contractor is a party; and
- (b) relates to any disputes arising out of, or in connection with, any Linked Claims

'Linked Entitlement' means the Entitlement of the Construction Contractor in respect of a Linked Claim (if any) such Entitlements being ascertained in accordance with Clause 48A.

'Claim' includes any claim, action, demand or proceeding:

- (a) under, arising out of, or in any way in connection with, the Construction Contract, including any direction of the Contractor's Representative;
- (b) arising out of, or in any way in connection with work under the Construction Contract, the Works, or either party's conduct before the Date of Construction Contract; or
- (c) otherwise at law or in equity, including by statute, in tort (for negligence or otherwise, including negligent misrepresentation) or for restitution, including for an increase in the Contract Sum, for payment of money (including damages) or for an extension of time to the Date for Practical Completion,

including for an increase in the Contract Sum, for payment of any money (including damages) or for an extension of time to the Date for Practical Completion.

'Entitlement' means any rights, remedies, benefits, compensation, recovery or other relief.

23 Relevantly, the Head Contract:

- (a) provided that any sub-contract conditions shall include provisions which may be reasonably necessary to enable the Contractor to fulfil its obligations to the Principal¹¹ and that the grant of the Principal's approval to VCIP to subcontract shall not relieve VCIP from any liability under the Head Contract.¹²
- (b) provided that any sub-contract shall not include 'pay when pay' provisions and in respect of payment provisions be consistent with the sub-contractor's ability to enjoy the benefits provided under the SOP Act.¹³
- (c) made provision for the modular cells in equivalent terms to those of the Construction Contract.

The alleged Linked Claims

24 VCIP contended that Built made the following Linked Claims, eight of which were extant as at the date of VCIP's March 2025 NOD, and seven of which were extant as at the date of the hearing on 24 and 25 September 2025.¹⁴ The eight pre-14 March 2025 Claims were:

- (a) that Built claimed it was entitled to an extension of time for practical completion (**EOT Claim**);¹⁵
- (b) that Built claimed it was entitled to have a variation direction issued (**Variation Claim**);¹⁶
- (c) that the State had not issued valid directions under cl 30.3 of the Head Contract for VCIP to rectify the Modular Cell Defects (**Invalid Direction Claim**);¹⁷

¹¹ Head Contract, cl 9.2(a).

¹² Head Contract, cl 9.3.

¹³ Head Contract, cl 9.2(a).

¹⁴ In submissions VCIP provided a list of alleged Linked Claims and Linked Disputes (**VCIP's list of claims**).

¹⁵ VCIP's list of claims, [1], [10].

¹⁶ VCIP's list of claims, [2].

- (d) that VCIP and the State breached cl 8.11 of the Construction Contract, and that the modular cells were not properly designed or manufactured (**Design Claim**);¹⁸
- (e) that Built was entitled to relief from its obligation to pay liquidated damages under the Construction Contract (**Relief from Damages Claim**);¹⁹
- (f) that Built was entitled to payment of delay costs (**Delay Claim**);²⁰
- (g) that Built was not obliged to perform rectification works unless and until a valid variation direction was issued (**Relief from Rectification Claim**);²¹
- (h) that Built was entitled to compensation in relation to work performed in relation to the modular cell defects (**Compensation Claim**).²²

25 As to the claims made or remaining on foot post-14 March 2025:

- (a) that Built was prevented from protecting the modular cells from rain, and was therefore not liable for the modular cell defects (**Rain Claim**);²³
- (b) VCIP also submitted that the Invalid Direction Claim, the EOT Claim, the Relief from Damages Claim, the Design Claim, the Delay Claim, and the Relief from Rectification Claim remained on foot.

Surrounding Context – Dealings between the parties

26 The proposed declarations concern whether the claims and disputes described in the March 2025 NOD *are or were* 'Linked Claims' or 'Linked Disputes' within the meaning of the Construction Contract (and accordingly whether cl 48A of the contract has any effect in relation to those claims and disputes). In construing contractual notices the proper approach is to ask how a reasonable recipient would

¹⁷ VCIP's list of claims, [3], [9].

¹⁸ VCIP's list of claims, [4], [13].

¹⁹ VCIP's list of claims, [5], [11].

²⁰ VCIP's list of claims, [6], [14].

²¹ VCIP's list of claims, [7], [15].

²² VCIP's list of claims [8].

²³ VCIP's list of claims [12].

have understood them having regard to surrounding circumstances.²⁴ In this case it is necessary not only to construe the words used in the NOD to describe the claims and disputes but to understand their character by reference to the parties' dealings that comprised or evidenced their claims and disputes. The relevant communications were as follows.

- 27 On 4 August 2023, the State wrote to VCIP notifying it under the Head Contract that defects had been identified in some of the modular cells installed at the Metropolitan Remand Centre (**modular cell defects**), and that work not in accordance with the Head Contract had been discovered. The State observed that under the Head Contract the care of each modular cell was the responsibility of VCIP upon execution of a statement of delivery, and asked VCIP to investigate and report back.
- 28 On 10 August 2023, VCIP wrote to Built in substantially the same terms about the defects, passing on the information it had received from the State, saying that under the Construction Contract the care of each modular cell was the responsibility of Built upon execution of a statement of delivery. It asked Built to investigate and report back, then meet with it and the Principal.
- 29 On 2 September 2023, the State directed VCIP under cl 30.3 of the Head Contract to correct the alleged defects identified in the modular cells, denying any liability for the cost of correcting the defects and stating that the defects must be corrected in order for VCIP to achieve practical completion of separable portion 2 (**SP2**) under the Head Contract. On 4 October 2023, VCIP provided the State's correspondence to Built, asking it to 'progress required action' in accordance with the State's letter.
- 30 On 30 November 2023, Built responded to VCIP that it 'does not accept full responsibility for these defects' and that the Principal had adversely affected the Construction Contractor's ability to rectify defects. Built said it had not been provided with quality assurance documentation to confirm compliant manufacturing of the modular cells, and noted that by an amendment to the

²⁴ *Alphington Developments Pty Ltd v Amcor Pty Ltd* [2025] VSCA 48, [243] (Walker and Whelan JJA).

Construction Contract, the modular cells had been provided with a conditional manufacture and completion certificate. It said it did not have confidence that the modular cells had been manufactured in accordance with the design documents. It sought the Principal's engagement with it to correct defects and sought confirmation that the Principal would not apply liquidated damages.

31 On 18 December 2023, the State gave notice to VCIP of additional modular cell defects it said it had discovered, directing VCIP to correct the defects. On 21 December 2023 VCIP wrote to Built in substantially the same terms, notifying it of the additional defects and directing it under cl 30.3 of the Construction Contract to rectify all modular cell defects identified by the Principal.

32 On 19 January 2024, Built responded to VCIP's defect notices. It said that it had not been provided with all information necessary to progress the defects rectification process, reiterating that it did not accept responsibility for the defects but was committed to completing all remaining works.

33 On 31 May 2024, Built wrote to VCIP, stating that the purpose of its letter was 'to request that a variation direction be issued for works required to rectify defects in the modular cells and damage resulting therefrom, which are the responsibility of the contractor and which do not currently fall within the scope of works to be performed by Built under the Construction Contract'.²⁵ Built said that

The extensive investigations undertaken have revealed that that the Modular Cells were not properly designed, were poorly manufactured and as a result have systemic defects. These defects have allowed the water ingress in the Modular Cells which has resulted in the mould, rust and related damage which has been uncovered by the investigations carried out to date...

... The effect of the above matters is that the rectification works required to the Modular Cells to overcome those defects and deficiencies is not within the scope of the Works which Built is required by the Construction Contract to carry out in the absence of a Variation direction.

If the Contractor wishes to engage Built to undertake that work, a direction (which clearly identifies the scope of the rectification work required) should be issued by the Contractor by way of a formal Variation direction under the Construction Contract. That Variation direction should include the extensive

²⁵ This constituted the Variation Claim in VCIP's list of claims.

investigation and rectification work which Built has carried out at its significant cost since September 2023.

- 34 On 7 June 2023, Built gave notice to VCIP of a proposed claim under cls 46.1 and 46.3 of the Construction Contract, stating

... The Construction Contractor considers that a proposed claim is likely to arise in respect of the completion of Separable Portion 2 in circumstances where the Contractor has linked the completion of Separable Portion 2 to the rectification of the defects identified in the Modular Cells. It appears from the 6 June Letter that the Contractor has taken this position despite being in receipt of the 31 May Letter which outlines the Construction Contractor's position as regards the defects identified in the Modular Cells and requests a variation to complete the rectification works required in respect of the Modular Cells.²⁶

The proposed claim was advanced by Built's letter of 8 July (below).

- 35 On 20 June 2023, VCIP issued a letter to the State in substantially the same terms as the letter from Built to VCIP of 31 May 2024, requesting a variation direction for works required to rectify the modular cell defects which it said were the responsibility of the State. Separately, VCIP issued a notice of proposed claim to the State under cls 46.1 and 46.3 of the Head Contract in substantially the same terms as Built's notice of claim to VCIP of 7 June 2023.

- 36 By letter to VCIP of 8 July 2024, Built claimed an extension of time for practical completion under cl 35.5 and part 41 B of Annexure Part A of the Construction Contract.²⁷ Built stated that practical completion of SP2 had not been achieved because of certain defects identified in the modular cells. It said that VCIP's failure to provide a variation direction meant that Built did not know what if any rectification work it was required to carry out, and that failure was delaying the achievement of

²⁶ This constituted the EOT Claim, the Variation Claim, the Design Claim, and the Relief from Damages Claim per VCIP's list of claims.

²⁷ The EOT claim in VCIP's list of claims.

practical completion of SP2. In numerous subsequent letters to VCIP, Built renewed and extended its claim for an extension of time for practical completion.²⁸

- 37 By a further letter of 8 July 2024, Built gave particulars to its notice of claim dated 7 June 2024. Built reiterated that it had sought a variation direction for rectification works, which remained outstanding, saying

... the fact remains that the Construction Contractor cannot achieve Practical Completion of Separable Portion 2 until the defects identified in the Modular Cells have been rectified. Since the 7 June Notice, open discussions and without prejudice discussions with both the Contractor and the Principal have not advanced the position in respect of (i) the extent of rectification required; and (ii) payment for the rectification of the defects and reinstatement of the Modular Cells.²⁹

- 38 By its 8 July letter, Built gave notice under cl 46.1 of the Construction Contract that a Claim had arisen, saying that that claim 'relates to the contractor's ongoing failure to provide the construction contractor with the necessary variation direction on the scope of the rectification works which the contractor requires the construction contractor to carry out'. In particularising that claim, Built:

- (a) referred to the agreed variations to the Head Contract and the Construction Contract made by the 1 December variation notice,³⁰ saying that the variation notice created a positive obligation on VCIP to identify where the nominated

²⁸ On 18 July 2024, Built claimed 231 days; on 24 July 2024, Built claimed 236 days; on 9 August 2024, Built claimed 252 days; on 27 August 2024, Built claimed 270 days; on 12 September 2024, Built claimed 286 days; on 1 October 2024, Built claimed 305 days; on 17 October 2024, Built claimed 305 days; on 1 November 2024, Built claimed 338 days; on 19 November 2024, Built claimed 356 days; on 5 December 2024, Built claimed 372 days; on 19 December 2024, Built claimed 390 days for the notice due on 23 December 2024, and 411 days for the notice due on 13 January 2025; on 30 January 2025, Built claimed 428 days; on 17 February 2025, Built claimed 446 days; on 5 March 2025, Built claimed 462 days; on 24 March 2025, Built claimed 481 days; on 9 April 2025, Built claimed 496 days; on 30 April 2025, Built claimed 517 days; on 16 May 2025, Built claimed 533 days; and on 3 June 2025, Built claimed 551 days.

²⁹ This constituted the Variation Claim, Design Claim and Relief from Damages Claim per VCIP's list of claims.

³⁰ That VCIP would provide Built with 'Conditional Completion Certificates' for modular cells that have defects or are incomplete (**nominated modular cells**); the Conditional Completion Certificates would identify where the nominated modular cells did not comply with the modular cell requirements; VCIP would remain responsible for ensuring the State procured the rectification or completion of the defects from the manufacturer; the rectification works would be completed at the State's expense and risk; VCIP would notify Built when it was of the opinion the nominated modular cells were fully compliant; and if the defects had not been rectified or completed such that they prevented Practical Completion being achieved, Built would be entitled to an extension of time.

modular cells were non-compliant or defective, which VCIP had failed to carry out, and as a result the defects were only discovered after their installation;

- (b) reiterated that it bore no obligation or liability in respect of any defects arising from the design of the modular cells (citing cl 8.8 of the Construction Contract);
- (c) stated that VCIP is liable for the cost of the work required to investigate and remediate the defects in the modular cells along with the delay impact and 'must provide a variation direction' to Built identifying the scope of the works it required Built to carry out;
- (d) provided an estimated cost for Built to carry out the rectification works and said that as at that time it had incurred \$3,376,524.48 (ex GST) in respect of the investigation and remediation work carried out;³¹
- (e) stated that it considered that 'the subject of this notice'³² was a Linked Claim for the purposes of cl 48A of the Construction Contract. Built gave its reasons for that position, namely that the correspondence exchanged on the matters the subject of this notice has been passed up by the Contractor to the Principal and categorised as correspondence issued pursuant to the terms of the Head Contract; the June notice had been reproduced by the Contractor to the Principal on 20 June 2024; the provisions relied upon in the 8 July notice are replicated in the Head Contract, 'placing the Principal with ultimate liability in respect of the matters raised in this notice'; and that the matters in the notice relate to the completion of SP2 which is a common milestone in the Construction Contract and the Head Contract.

39 On 17 July 2024, VCIP issued a letter to the State claiming an extension of time for practical completion of SP2 under cl 35.5 and Part 41B of Annexure Part A of the

³¹ This constituted the Compensation Claim in VCIP's List of Claims.

³² The notice given by its 8 July 2024 letter.

Head Contract, passing up the claim by Built against VCIP. On the same day, VCIP gave notice to the State of the particulars of its proposed claim notice of 20 June. By that notice, VCIP replicated in substance the claims and statements made by Built in its 8 July 2024 notice and particulars of claim. VCIP stated that a Claim had arisen under cl 46.1 of the Head Contract. It said that the State was liable for the cost of the work required to investigate and remediate the defects in the modular cells and must provide a variation direction to VCIP identifying the scope of the work it required VCIP to carry out.

40 On 17 July 2024, VCIP wrote to Built informing it that its particulars of claim had been passed up to the State, and reminding Built of its obligations under sub-cl 48A.1 of the Construction Contract to submit a draft notice and documents in respect of the Linked Claim, to co-operate with VCIP and to take all reasonable steps to assist VCIP's pursuit of the Linked Claim under the Head Contract.

41 On 23 July 2024, Built wrote to VCIP saying it was aware of its obligations under sub-cl 48A.1 and would act in accordance with them 'in respect of the 7 June Linked Claim'.³³

42 On 14 August 2024 the State wrote to VCIP responding to its request for a variation direction and extension of time for practical completion:

- (a) reiterating its position that the modular cell defects were caused by acts or omissions of VCIP or the Construction Contractor, that VCIP had accepted all risk in respect of the modular cells upon execution of statements of delivery and that it must rectify all defects, loss and damage to the modular cells;
- (b) rejecting VCIP's request for a variation direction and its request for an extension of time for practical completion of SP2;
- (c) reiterating its position that its representative had validly issued defects notices under the Head Contract and that existing directions to rectify defects

³³ This constituted the EOT Claim in VCIP's list of claims.

were sufficient for VCIP to proceed with work to achieve practical completion of SP2;

(d) responding to the allegations about modular cell design issues, making numerous allegations concerning the role of VCIP and the Construction Contractor in controlling and carrying out the installation of the modular cells which the State said were linked to the modular cell defects.

43 On 22 August 2024, VCIP wrote to Built in substantially the same terms as the State's letter to VCIP of 14 August 2024, rejecting Built's request for a variation direction and its request for an extension of time.

44 On 18 September 2024, Built responded to VCIP's letter of 22 August. It re-stated its position that the defects in the modular cells were not caused by Built, that the modular cells contained extensive rust and mould on delivery to the Metropolitan Remand Centre site which had not been identified by VCIP when issuing conditional completion certificates, and that responsibility for their rectification 'rests with VCIP and presumably the Department'.

45 On 9 December 2024, Built issued a Notice of Dispute to VCIP under cl 47.1 of the Construction Contract (**Built's 9 December 2024 NOD**).³⁴ The NOD relevantly provided in substance:

Notice of Dispute

The Construction Contractor refers to the Contractor's letter dated 22 August 2024 and disputes the allegations of fact and law made by the Contractor against the Construction Contractor in that correspondence including the allegations ...

- a. the allegation that the Construction Contractor accepted design responsibility in connection with the Modular Cells;
- b. the allegation that the Modular Cells were not deficient;
- c. the allegation that the Construction Contractor accepted the risk of the manufacturer of the Modular Cells failing to

³⁴ VCIP submitted that the EOT Claim, the Variation Claim, the Invalid Direction Claim, the Design Claim and the Delay Claim were the subject of the 9 December 2024 NOD.

manufacture the Modular Cells in accordance with the Modular Cell Requirements;

- d. the allegation that the Construction Contractor accepted the risk of the State breaching the warranties given by it in clauses 8.10(a) and 8.11 of the Contract;
- e. that the Construction Contractor is responsible for any Liability incurred by the Contractor because of breaches by the manufacturer of the contract between it and the State or the breaches by the State of clauses 8.10(a) and 8.11 of the Contract;
- f. the allegation that the Construction Contractor failed to identify the Modular Cell Defects prior to their delivery;
- g. the allegation that any alleged non-conformance with the Modular Cell Requirements were caused by acts or omissions of the Construction Contractor;
- h. the allegation that the Construction Contractor failed to comply with the Handling Documents;
- i. the allegation that major water ingress occurred after the delivery of the Modular Cells or ... did not occur ... was not caused by deficiencies in the design or manufacture of the Modular Cells for which the Contractor and the State are responsible;
- j. the allegation that the Contractor has issued valid directions under clause 30.3 of the Contract requiring the Construction Contractor to rectify the Modular Cell Defects;
- k. the Contractor's refusal to provide a variation direction if it requires the Modular Cell Defects to be rectified by the Construction Contractor;
- l. the Contractor's rejection of the Construction Contractor's request for an extension of time.

2. Outcome Sought

The Construction Contractor seeks:

- A. a Variation direction to perform such works as the Contractor requires the Construction Contractor to perform to rectify the alleged defects and deficiencies in the Modular Cells; and
- B. an extension of time and delay costs to account for the delay caused by the Modular Cell Defects (including delay arising from a Variation direction referred to in paragraph A above); and

- C. further remuneration as a consequence of having to perform additional work required as pursuant to a Variation direction referred to in paragraph A above.

- 46 On 9 December 2024, Built wrote to VCIP, referring to Built's 9 December 2024 NOD and stating that having taken further advice, its position was that cl 48A of the Construction Contract was void by reason of ss 13 and 48 of the SOP Act and as a result, cl 48A did not apply to the resolution of the 'current dispute'.
- 47 On 13 December 2024, VCIP requested a version of Built's 9 December 2024 NOD it could pass on to the State, saying '[VCIP] requires corresponding draft notices under the Head Construction Contract for the purpose of clause 48A.1(c)'. On the same day, Built provided the draft notice 'without prejudice to its position that cl 48A was void'.
- 48 On 17 December 2024, VCIP wrote to Built disputing its contentions about the application of cl 48A of the Construction Contract, stating that it considered it was obliged to pursue the Linked Claim subject to certain parts of cl 48A and that it had arranged for a notice of dispute to be issued under the Head Contract, which would commence the dispute resolution process under the Head Contract in relation to the Linked Claim. VCIP said the Linked Claim had been initiated by Built and 'relates to a dispute arising out of or in connection with a Linked Claim' and was a Linked Dispute for the purposes of cl 48A. It said that once a Linked Dispute has commenced, the parties agree that it must be conclusively resolved under, and in accordance with, the upstream dispute resolution process, and will not be progressed under the Construction Contract while it is being resolved upstream, pursuant to sub-cl 48A.4. Therefore the dispute resolution process under the Construction Contract was effectively suspended until the upstream process ran its course.
- 49 On 13 December 2024, under protest, Built provided to VCIP a draft notice of dispute from VCIP to the State, passing up Built's claims and allegations in its 9 December 2024 NOD. VCIP issued that Notice of Dispute to the State on 17 December 2024 (**VCIP's December 2024 NOD**).

- 50 On 20 December 2024, VCIP prepared a draft letter for VCIP to send to the State, which said that 'the issue of the modular cell defects is the subject of a Notice of Dispute dated 17 December 2024, and all issues the subject thereof should be addressed in that forum'. The letter reiterated that the modular cell defects were not caused by acts or omissions of VCIP or Built. VCIP wrote to the State, in the terms prepared by Built, on 23 December 2024.
- 51 On 5 February 2025, VCIP wrote to Built regarding further alleged defects in the modular cells identified by the State and directing Built to rectify the defects.
- 52 A dispute arose between the State and VCIP about whether VCIP's December 2024 NOD complied with contractual requirements for particularisation. On 10 February 2025, Built prepared correspondence for VCIP to send to the State. Among other things, the letter stated that cl 30.3 did not empower the State to direct VCIP to rectify the modular cell defects. On 13 February 2025, VCIP provided the State further particulars of Built's 9 December 2024 NOD, which had been prepared by Built.
- 53 On 6 March 2025, the State issued to VCIP a notice of substantial breach under cl 44.2 of the Head Contract, for failing to comply with the Principal's directions made under cl 30.3 of the Head Contract in respect of the rectification of the defects that were the subject of earlier notices. It stated that VCIP was required to pay the State the sum of \$220,000,000 (ex GST) as compensation for those substantial breaches (or to remedy the breaches by the stipulated time), that VCIP was in substantial breach of cl 33.1 of the Head Contract for invalidly suspending the progress of part of the works and failing to proceed with due expedition, that VCIP was in breach of cl 35.2 of the Head Contract for failing to achieve practical completion of SP2 by the specified date, and that the State required VCIP to achieve practical completion (or otherwise remedy the consequences of its breach) by 16 February 2022.
- 54 By letter to VCIP dated 6 March 2025, Built maintained that it was not required to rectify the defects to the modular cells unless it was given an appropriate variation

direction. Built denied the authority of the Principal's representative to issue a notice pursuant to cl 30.3 of the Contract directing the performance of the rectification works described in the relevant defects notices, on the basis that the material or work alleged to be defective was not provided by Built, and thus could not be a 'defect' within the meaning of the Construction Contract.³⁵

55 On 7 March 2025, the State issued a Notice of Dispute to VCIP (the **State's March 2025 NOD**).

56 On 13 March 2025, VCIP issued a notice of substantial breach to Built under cl 44.2 of the Construction Contract alleging failure to comply with directions, suspending works and failing to proceed with due expedition and failure to achieve practical completion of SP2 by 30 November 2023. The notice required Built to achieve practical completion, rectifying its breaches, by 16 February 2026.

57 On 14 March 2025, VCIP issued its March 2025 NOD to Built. The March 2025 NOD identified the following disputes said to arise under the Construction Contract, setting out in each case the contractual provisions relied upon and circumstances said to give rise to the disputes:

(a) a dispute under cls 16.2 and 30.3 in relation to defective work and material.

The notice stated that 'there is a dispute as to whether Built has failed to rectify defective work and material or loss or damage to the work under the Construction Contract at its costs and in accordance with cls 30.3 and 16.2';

(b) a dispute under cl 33.1 in relation to suspending work and failing to proceed with due expedition and without delay. The circumstances said to give rise to the dispute included Built's denials of its obligation to rectify defective works and its failure to comply with VCIP's directions for redesign, reconstruction, replacement or correction;

³⁵ This constituted the Invalid Direction Claim in VCIP's list of claims.

- (c) disputes under cl 35 in relation to delay to practical completion of SP2. The notice stated that there was a dispute as to whether Built was delayed in reaching practical completion and SP2, and was consequently indebted to VCIP for liquidated damages;
- (d) disputes in relation to substantial breaches of the Construction Contract, referring to VCIP's notice of substantial breaches dated 13 March 2025;
- (e) disputes under cl 33.5 in relation to the construction contractor's program;
- (f) disputes in relation to the [Head Contract] warranties, relating to the defects that had not been rectified.

58 Under the heading 'outcome sought' the March 2025 NOD stated that VCIP sought declarations including that Built must rectify defects, that it had invalidly suspended works and failed to proceed without delay, that Built had not achieved practical completion of SP2 by the relevant date, and that VCIP is entitled on notice to terminate the Construction Contract or take uncompleted works out of Built's hands. The notice stated that VCIP sought an order that Built be required to pay it liquidated damages comprising \$9,760.135 (ex GST) for the period from 30 November 2025 to 6 March 2025 and thereafter \$21,145 (ex GST) per day. As noted earlier, the NOD stated that 'the matters raised by this notice concern Linked Claims and give rise to Linked Disputes' and that, in accordance with sub-cl 48A.4(b) of the Construction Contract, the Linked Disputes would not be progressed under that contract while the Linked Dispute was being resolved between the State and VCIP under the Head Construction Contract, with the parties' relevant obligations suspended.

59 On 18 March 2025, Built wrote to VCIP that if the State's March 2025 NOD was referred to arbitration, it may be Built's position that VCIP's 14 December NOD (addressed to the State) should be withdrawn, in which case Built would withdraw its notice of 9 December 2024 issued to VCIP.

- 60 On 20 March 2025, Built wrote to VCIP about the March 2025 NOD. Built said, among other things, that the allegations in the NOD did not constitute Linked Claims and the disputes notified in the NOD were not 'Linked Disputes' as defined in the Construction Contract. Built also stated that it did not agree with the contentions in the NOD about the application of cl 48A but said in the alternative that cl 48A was void by reason of ss 13 and 48 of the SOP Act. Built sought to continue the dispute resolution process provide under cl 47 of the Construction Contract.
- 61 In various letters to VCIP dated 21 March 2025, Built reiterated it was not obliged to perform rectification works unless it was given a valid direction, denying that further directions purportedly given by VCIP were valid.³⁶
- 62 On 26 March 2025, VCIP wrote to Built stating, among other things, that the terms of the Construction Contract relating to the disputes identified in the March 2025 NOD were 'back to back' with the terms of the Head Contract and as such Built's obligations were the same as VCIP's obligations under the Head Contract. VCIP set out its rebuttal of Built's position concerning the application of cl 48A.
- 63 Built responded to VCIP on 28 March 2025. Among other things, Built said that its denials of liability were not 'Claims' and that it had sought a variation in its 9 December 2024 NOD. However its position was that no court or arbitrator could direct VCIP or the State to issue a variation (it was not a 'justiciable dispute'), that the rectification of the defects sought by VCIP and the State was not part of the works for which Built was responsible, and the request for a variation was an 'assertion made in defence of the claims made by the State and the Contractor'. The same characterisation was said to apply to 'the time and cost implications referred to in the [9 December 2024 NOD]'. Built said that but for the claims made by the State and VCIP there would be no dispute and that 'to avoid further futile argument in relation to this issue, the Construction Contractor withdraws its Notice of Dispute dated 9 December 2024'.

³⁶ This constituted the Relief from Rectification Claim in VCIP's list of claims.

64 On 1 April 2025, Built responded to the March 2025 NOD by denying its claims and allegations, stating:

the Construction Contractor is not responsible to rectify the defects in the Modular Cells. It is the Contractor's failure to either rectify the defects in the Modular Cells or issue a variation direction for their rectification that has prevented the Construction Contractor from achieving Practical Completion of Separable Portion 2 by the relevant Date for Practical Completion;

(b) the Contractor is not entitled to rely on an alleged breach of the Construction Contract which is the product of its own wrongful conduct as the basis for the issue of a notice under clause 44.2.³⁷

65 VCIP passed Built's response up to the State on 4 April 2025.

66 On 14 April 2025, VCIP wrote to Built stating, among other things, that the claims and denials which continue to be advanced by Built were Claims falling within each of the sub-paragraphs of the contractual definition of Linked Claims, and that cl 48A had already been engaged in relation to the dispute arising out of the defects in the modular cells; there were Linked Claims already on foot. VCIP said that unless Built intended to concede that it bore responsibility for each and every dispute in its NOD and in turn, the State's NOD, it was inevitably going to continue to make assertions of right on the basis that it bore no responsibility in relation to the defects and would continue to pursue claims that are Linked Claims.

67 On 16 April 2025, VCIP advised Built that the State had referred the disputes that were the subject of the State's March 2025 NOD to arbitration. VCIP reiterated its position that cl 48A had been engaged in relation to Built's 9 December 2024 NOD. After further correspondence, Built issued proceedings seeking declaratory relief in this Court.

68 On 12 June 2025, VCIP issued a notice to Built under cl 47.1 of the Construction Contract. VCIP described the events to date, and said that Built had not withdrawn its proposed Claims or its EOT Claim, that it continued to maintain that the modular cell defects arose from the Principal's breaches of modular cell warranties, and that

³⁷ This constituted the Relief from Damages Claim and the Relief from Rectification Claim in VCIP's list of claims.

Built was not liable for liquidated damages and was likely to continue to claim an extension of time for practical completion, delay costs and compensation in relation to the modular cell defects. VCIP said that it sought determinations as to whether VCIP breached cl 8.11(a) of the Construction Contract, whether the directions under cl 30.3 were invalid, whether Built was entitled to an extension of time and/or delay costs on account of the modular cell defects or whether Built was entitled to further remuneration or relief. It stated that 'the matters raised by this notice concern Linked Claims and give rise to Linked Disputes'. VCIP said that it had issued an equivalent notice to the State under the Head Contract; that it would progress that dispute under the Head Contract and that the Linked Disputes would not be progressed under the Construction Contract while the Linked Dispute was being resolved under the Head Contract.

69 On 20 June 2025, Built wrote to VCIP that it had withdrawn its 9 December 2024 NOD which was no longer necessary because the validity of VCIP's claims against Built would be resolved pursuant to VCIP's March 2025 NOD, and that its contentions, including in relation to the validity of directions made were by way of defending claims by VCIP. In respect of its EOT claim, Built said that it was *'based on a contention that VCIP was obliged to issue a variation direction to Built to perform works to rectify defects in the modular cells. Built accepts however that the decision on whether or not to issue a variation direction is a matter for VCIP which is not justiciable. Accordingly, the 8 July 2024 EOT claim is not pursued by Built. There is no dispute to resolve, and this matter is not properly the subject of VCIP's purported Notice of Dispute'*. Built said that the contention that it was entitled to further remuneration *'was premised on the contention that VCIP was obliged to issue a variation direction to Built to perform work to rectify defects in the modular cells. As noted ... that contention is not pursued. As no such variation direction has been issued by VCIP this matter does not require to be resolved and cannot be the subject of a Notice of Dispute'*.

70 On 1 July 2025, VCIP wrote to Built, referring to correspondence from the State in which the State observed that the upstream notice of dispute contained positive

allegations for which VCIP would carry the legal and evidentiary burden of proof, including allegations that the modular cell design was deficient and caused the modular cell defects and that the directions of the Principal's representative issued under the Head Contract were invalid. Those allegations were the same as those made by Built. VCIP said that it understood that those matters were likely to form the basis of any defence and/or counterclaim that Built would seek to raise in response to matters that were the subject of VCIP's March 2024 'downstream' notice were it not stayed pursuant to cl 48A, and that Built would require VCIP to advance those same matters in response to the State's March 2025 NOD, upstream, in the extant arbitration proceedings. It asked Built to say how it intended to advance its various contentions without seeking relief.

71 In further correspondence of 2 July 2025, VCIP referred to a letter from the State whereby the State maintained that certain claims should be advanced by VCIP as 'positive claims' in the State-VCIP arbitration proceedings. VCIP referred to Built's correspondence which VCIP said 'suggests that Built no longer seeks to pursue the relevant positive Linked Claims', being an extension of time claim dated 8 July 2024 and a notice of proposed claim dated 7 June 2024, among other Linked Claims. VCIP sought confirmation that 'Built abandons the EOT Claim and Proposed Claim, irrevocably releases VCIP from those claims, and does not intend in the future to bring a claim against (or otherwise seek relief of any kind from) VCIP arising out of or in connection with the factual matters the subject of those claims', and 'confirmation that Built does not require VCIP to pursue the EOT Claim and Proposed Claim Linked Claims in the State-VCIP arbitration and agrees to VCIP advising the State that these claims will not be pursued'. VCIP said that subject to Built's response, it would treat the 'Linked Claims' as being abandoned by Built and would unequivocally communicate to the state that the corresponding upstream claims would not be pursued in the State-VCIP arbitration.

72 Built responded on 2 July 2025 that it was not appropriate for VCIP to attempt to interrogate Built as to the grounds on which it intends to defend disputed claims

made by VCIP against Built, and that should Built defend the claims made by VCIP against Built in VCIP's March 2025 NOD, such defences would not constitute the making of a claim or potential claim. Built stated it was not intending to make a claim for costs. In further correspondence dated 3 July 2025, Built stated it was 'not pursuing (or intending to pursue) claims against [VCIP] which would require your client to make a claim against the State in respect of the upstream arbitration'.³⁸

73 By letter dated 8 July 2025, VCIP wrote to the State, saying relevantly that VCIP had been very recently informed by Built that it was not pursuing (or intending to pursue) certain Linked Claims the subject of VCIP's Notice of Dispute. Repeating the language from Built's letters to it, VCIP told the State that 'the 17 July 2024 EOT claim is not pursued by VCIP. There is no dispute to resolve' and that the contention that the State was obliged to issue a variation direction was 'not pursued' and 'there is no dispute to resolve'. VCIP added that 'to the extent that common law rules or equitable principles are relied upon to defend claims which the State makes against VCIP, such will be relied upon by way of defence (and, as VCIP understands, potential related counterclaim)'.

74 On 11 July 2025 the State wrote to VCIP that:

The State will proceed on the basis that VCIP has withdrawn the Claims described in your letter dated 8 July 2025.

75 The State continued that despite the vacillations in VCIP's approach, VCIP's positive case continued to include allegations of fact that the modular cell design was deficient and/or caused the modular cell defects, the modular cells were poorly manufactured and had systemic defects. Those matters were, it said, relevant to the procedural orders for arbitration.

Built's Submissions

76 Built submitted that the claims, allegations and disputes that were the subject of VCIP's March 2025 NOD originated in the State's 'upstream' claims against VCIP

³⁸ This constituted a potential EOT Claim and potential Relief from Damages Claim in VCIP's list of claims.

and do not satisfy the contractual language defining and concerning Linked Claims and Linked Disputes. Accordingly, cl 48A has no application to those claims and disputes. More specifically, Built submitted that:

- (a) The language of the Construction Contract establishes that a Linked Claim must be a claim or entitlement which Built holds against VCIP, which VCIP then seeks to pass on to other participants upstream. A Linked Claim is a claim or entitlement 'of' Built 'against' VCIP. Contextually, the exclusions from the definition of 'Linked Claim' each also point to Linked Claims as emanating from Built and giving rise to rights which VCIP can pursue upstream against the relevant upstream party. A Linked Dispute must have its genesis in a Linked Claim. A claim by VCIP for defects in Built's work does not match that description. A downstream claim pursued against Built is not a claim 'of' Built against VCIP, but the reverse.
- (b) The 'linked' character of a claim made by Built against VCIP flows from that claim arising out of, or in respect of, the same, or substantially similar, facts or circumstances, actions or omissions as an actual or potential claim or entitlement that VCIP has against an upstream party. However, unless the claim under the Construction Contract is a claim entitlement 'by' or 'of' Built (as the relevant chapeau to the definition of Linked Claim requires), it is not a Linked Claim.
- (c) There is no basis to contend, as VCIP does, that a Linked Claim or Linked Dispute can be constituted by a denial of liability by Built. That contention disregards the chapeaux to the definition of 'Linked Claim' and the wide contractual definition of 'Claim' namely as including 'any claim, action, demand or proceeding' (arising in the manner specified), and including for an increase in the contract sum, for the payment of money or for an extension of time. A 'claim' is not a 'defence'. Borrowing the language of equity, a claim is a sword. Nor can a denial of liability be treated as an implicit claim. The contractual language captures a positive assertion of entitlement and not a

defence or denial of liability. VCIP makes an untenable and far-reaching contention that where VCIP passes onto Built claims made against it by the State, unless and until Built concedes VCIP's claims, any downstream claim which VCIP passes on from the State to Built is also a Linked Claim which engages cl 48A.

- (d) The language of sub-cl 48A.1 indicates that the requirements of cl 48A are engaged if Built *intends to or does make* a claim against VCIP. This is sufficient to dispose of the issue because the operation of cl 48A is predicated on Built bringing a Linked Claim.
- (e) The manner in which cl 48A operates points contextually toward Linked Claims and Linked Disputes residing with Built against VCIP under the Construction Contract, and not to claims raised by an upstream party passed through by VCIP. VCIP's obligations under sub-cl 48A.3 have no utility where VCIP is pursuing a claim against Built. Further, once cl 48A is engaged it imposes upon Built the burden of assisting VCIP to establish VCIP's corresponding entitlement against the upstream party under the upstream document, and limits Built's entitlements in respect of the Linked Claim to those obtained by VCIP from the upstream party. The burden of the obligations and the consequences flowing from them are significant and their presence is consistent with Linked Claims only arising so that cl 48A is engaged only where the decision whether to pursue a claim resides with Built. It would be commercially untenable if those consequences were visited upon Built in circumstances in which it has not itself determined to bring a claim and decided how to frame that claim. The Court should be astute to avoid a construction of a commercial contract which stands to generate uncommercial consequences which sophisticated parties cannot sensibly be regarded as having objectively intended.³⁹ Taken as a whole, the features of

³⁹ Citing *Zhu v Treasurer (NSW)* (2004) 218 CLR 530, 559 [82] (Gleeson CJ, Gummow, Kirby, Callinan and Heydon JJ); *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656-7 [35] (French CJ, Hayne, Crennan and Kiefel JJ).

cl 48A demonstrate its purpose, which is to provide Built with a practical incentive to see that it only raises and pursues reasonable and bona fide claims against VCIP.

- (f) VCIP's contention that the Contract must be construed as far as possible by reference to the commercial object to be secured by a public private partnership is misconceived. The language of the contract is the surest guide to construction. The fact that the parties selected that procurement method has no bearing on the proper construction of the contract agreement.
- (g) Further, it cannot be said (as VCIP does) that cl 48A fulfils the function of passing claims downstream to Built 'to ensure consistency of rights and liabilities under both contracts or to ensure the back to backing of resolutions of disputes in claims'. Whilst sub-cl 48A.6 limits Built's entitlement to VCIP in respect of a Linked Claim by reference to VCIP's corresponding upstream entitlement there is no analogous provision regarding Built's liability to VCIP in respect of a claim made by the State. Clause 48A concerns Built's claims which might be pursued upstream and not the reverse.
- (h) As to the parties' dealings which VCIP characterises as giving rise to Linked Claims and Linked Disputes,
 - (iv) The source of the extant dispute (broadly described) is the State's allegations concerning defects and their consequences, which VCIP seeks to pass through to Built by its March 2025 NOD. But for the State's allegations there would be no dispute between the parties. Built's response is entirely defensive.
 - (v) VCIP's submission is premised on a far-reaching and erroneous proposition that unless Built capitulates to any claim which VCIP passes on from the State, and even when it does no more than put VCIP to its proof, a Linked Claim arises. The proposition that a bare defence is always coupled with a positive assertion is not supported

with any authority. At general law a denial can have a more limited effect of putting a plaintiff to proof.⁴⁰

- (i) The only Claims on foot within the contractual meaning of that expression are those initiated by the State regarding allegedly defective work. Built's response has been defensive, addressing the allegations regarding its work. Built's requests for a variation and extension of time arose in response to steps VCIP required it to take regarding the alleged modular cell defects.
- (j) Built's 9 December 2024 NOD was withdrawn.
- (k) VCIP's contention that a potential claim may constitute a Linked Claim is wrong. Sub-clause 48A.1 makes clear that cl 48A applies where the Construction Contractor *intends* to or does make a claim. The correspondence makes clear that Built does not intend to make a claim.

77 In respect of the alleged Linked Claims in VCIP's list of claims, Built responded as follows:

- (a) In respect of the EOT Claim,⁴¹ VCIP's case is predicated on the erroneous basis that all contentions are claims. Built's request for an extension of time was defensive. An extension of time would defeat a claim by VCIP and the State for liquidated damages. Further, the question of an extension of time hinges on whether a variation would be granted, and the request for a variation was withdrawn. The EOT Claim was withdrawn on 20 June 2025, and Built's 9 December 2024 NOD was withdrawn on 28 March 2025. The EOT Claim is not being pursued by either Built or VCIP at the Construction Contract or Head Contract level. There was accordingly no Linked Claim for the purposes of cl 48A.
- (b) In respect of the Variation Claim, the request for a variation arose as a consequence of VCIP's contention that it was liable for the defects. The

⁴⁰ Citing *Warner v Sampson* [1959] 1 QB 297; *Samaan v Kentucky Fried Chicken* [2012] NSWSC 1147.

⁴¹ VCIP's list of claims, 1[1], 9[10].

- request was 'not justiciable' and Built withdrew the request when it accepted that it had no entitlement to variation. The claim was not being pursued by either Built or VCIP at the Construction Contract or Head Contract level.
- (c) The Invalid Direction Claim was merely defensive in response to claims by VCIP and the State that Built failed to comply with an instruction.
 - (d) In respect of the Design Claim, Built had contended that the modular cell defects were caused by their design, for which Built was not liable, and that the State and VCIP had failed to comply with contractual standards relevant to the modular cells. Those contentions were merely defensive.
 - (e) The Relief from Damages Claim comprised merely defensive contentions, seeking that VCIP's claims be dismissed, advancing no claim for relief.
 - (f) In respect of the Delay Claim, Built's 9 December 2024 NOD had been withdrawn. In any event, Built's contention that it was entitled to further remuneration was premised on the contention that VCIP was obliged to issue a variation direction to Built to perform rectification works, but that claim was no longer being pursued. The Delay Claim is not being pursued by either Built or VCIP at the Construction Contract or Head Contract level.
 - (g) In respect of the Relief from Rectification Claim, Built contended that absent an instruction to vary, it was not obliged to perform the rectification work. That stance is defensive. Built seeks to have VCIP's claims dismissed and has not sought other relief.
 - (h) In respect of the Compensation Claim, Built's claim was predicated on its claim for a variation direction. The 8 July 2024 letter stated '...the Contractor is liable for the cost of the work required to investigate and remediate the defects in the Modular Cells along with the delay impact of those works *and must provide a variation direction...*'. The request for a variation and

compensation is not being pursued either under the Construction Contract or the Head Contract.

- (i) The Rain Claim was defensive; the contentions were advanced in support of having VCIP's claim dismissed. No other relief was sought.

78 As to declaratory relief, Built submitted that the declarations sought are neither premature nor addressed to hypothetical circumstances. The subject matter of the declarations is clear and concerns the claims and disputes that were the subject of VCIP's March 2025 NOD. VCIP is a proper contradictor and Built has a sufficient or real interest in obtaining relief. It stands to be the party required to discharge the burdens cl 48A will otherwise impose in the context of an existing arbitration between the State and VCIP.

VCIP's Submissions

79 VCIP submitted as follows.

80 VCIP did not dispute Built's contention that its claims in its March 2025 NOD were not in and of themselves Linked Claims. However, that contention avoids the real point of substance in issue. VCIP has never asserted that its claims against Built are Linked Claims. The March 2025 NOD does not make Linked Claims. Rather, it identifies disputes about existing claims. The NOD accurately states that 'the matters raised by this notice concern Linked Claims and give rise to Linked Disputes'. The March 2025 NOD must be construed in the context of what passed between the parties concerning the alleged defects in the modular cells, and the asserted contractual implications.⁴²

81 As to Linked Claims, VCIP has made claims against Built concerning alleged defects in the works and contractual breaches, as summarised in the March 2025 NOD. Built has disputed those claims and in doing so it has made claims against VCIP. Built has claimed contractual entitlements for variation directions, extensions of time, further

⁴² VCIP added that the March 2025 NOD also concerns disputes in relation to other defects that Built disputes.

remuneration and delay costs. It has also denied that it is liable for the alleged defects and said that the modular cells were not properly designed and have systemic defects, liability for which it attributes to VCIP and the State. In denying the claims against it, Built has alleged that VCIP is in breach of the Construction Contract (relying implicitly on the 'prevention principle'). Built has made positive allegations directed towards establishing entitlements to relief (claims for time and money), which Built itself has described as Linked Claims. Those claims are Linked Claims within the meaning of the Construction Contract and are part and parcel of the disputes the subject of the March 2025 NOD.

82 Under the Construction Contract, Linked Claims and Linked Disputes are related but are not the same thing. The disputes the subject of the March 2025 NOD are factually and contractually inter-related and connected. They are Linked Disputes because, in the language of the Contract, they 'relate to disputes arising out of or in connection with Linked Claims'. Built need not initiate a Linked Dispute, it need only be a party to it. Accordingly, a Linked Dispute may be initiated upstream.

83 The contractual text supports a broad reading of both 'Claim' and 'Entitlement'. The latter is defined to mean 'any rights, remedies, benefits, compensation or other relief' and should be understood to include relief from a liability or obligation. The contractual meaning of 'Claim' (which is consistent with its ordinary meaning) encompasses the assertion of a right to a declaration that a person is not liable. The general law accepts that a denial of liability can be a claim founding a right to a declaration, as this proceeding illustrates. Even a bare defence is always coupled with an assertion that the claim against the defendant must fail. The claimed right is at least to a dismissal or rejection of the plaintiff's claim.

84 Even if Built is right to say that in some circumstances a bare denial of liability could not amount to a Claim or Entitlement, that does not assist it because of the nature of the allegations that Built has made, beyond its denials of liability. In that context it is telling that Built does not only say that it is not liable. It makes positive allegations against VCIP and the State in respect of the modular cells. It attributes its failure to

reach practical completion to the State and VCIP by way of its allegations concerning responsibility for the modular cell defects, and the failure of the State and VCIP to issue variation directions for rectification works. In order to make good the denials it makes, Built will have to advance positive allegations directed towards establishing an entitlement to relief.

85 The definition of Linked Claim covers 'any claim or potential claim' and 'any entitlement or potential entitlement'. The contractual language of potentiality is important. For as long as Built denies liability there is at least the potential of Built seeking a negative declaration or the dismissal of the claim against it. A claim that is withdrawn may still be a Linked Claim. Built may again bring the positive claims for relief it has made and purported to withdraw. It has not given releases. Built's withdrawal of its notice of dispute, which was no more than a contractual mechanism to engage a contractual procedure, did not extinguish its underlying claims.

86 Built focusses on the words 'of the construction contractor against the contractor' and 'if the [Construction Contractor] intends to or does make a Claim against the [Contractor]' in sub-cl 48A.1. Each of those phrases is apt to include a claim, right or remedy of a negative declaration, or for the dismissal of a claim against it based on a denial of liability.

87 Clause 48A cannot be approached in a rolled-up way. When properly understood, its sub-clauses apply differentially to the subject matter they address. Only sub-cl 48A.4, 48A.5 and 48A.6 address Linked Disputes. Sub-clause 48A.5 may be understood as a contractual mechanism to deal with the potential for inconsistent liabilities and findings that would otherwise vex the intermediate party between the construction contractor and the State (i.e. VCIP). The implication of a downstream party (i.e. Built) making and then withdrawing a claim is addressed by the combined effect of sub-cl 48A.4(b) and 48A.5(b). Sub-clause 48A(b) provides that to the extent a dispute is a Linked Dispute it will not be progressed under the Construction Contract while it is being resolved between the Contractor and the upstream party,

and the running of time under, and the parties' obligations to comply with, the relevant provisions of the Construction Contract to which that Linked Dispute relates, will be suspended. Sub-clause 48A.5 provides that Built agrees to be bound by, and abide by, the outcome of any binding resolution, settlement, determination or award reached or agreed to by the Upstream Party and the Contractor in respect of any Linked Claims and/or Linked Disputes (including pursuant to any dispute resolution procedures). Once a dispute is properly characterised as a Linked Dispute it does not lose that characterisation upon the downstream party (Built) withdrawing its Linked Claim against VCIP or purporting to do so. Linked Disputes are to be resolved under upstream dispute resolution processes (sub-cl 48A.4(a)). Sub-clauses 48.4 and 48A.5 take effect to suspend the running of time and the parties' obligations under the Construction Contract in respect of that Linked Dispute, and Built is bound by the outcome of any binding resolution or determination of the Linked Dispute agreed between VCIP and the upstream party. That way, consistency between what occurs 'upstream' and 'downstream' in respect of the same or related disputes, is assured. As a matter of practicality, a withdrawal by Built of a claim against VCIP may well influence what VCIP and the State do with the Linked Dispute between themselves (depending on the terms of the purported withdrawal), but that is a matter for those parties to determine, and Built remains bound by what occurs upstream and dispute resolution processes under Construction Contract remain suspended in respect of the Linked Dispute while the Linked Dispute is being resolved.

88 Built's position is contrary to the purpose of cl 48A, which is to ensure the 'back-to-backing' of resolutions of disputes and claims under the Construction Contract and the Head Contract. The project is conducted through a public private partnership (PPP) in which VCIP is the intermediary between the builder and the State and has delegated most of its obligations to Built under the Construction Contract. The Linked Claims and Linked Disputes regime is a device for managing the risk of inconsistent findings of fact or law, or inconsistent rights, entitlements or other relief being awarded in respect of the two 'back to back' contracts. As Built

would have it, Built may de-couple the back to back nature of the contracts and the regime that the parties put in place to ensure that the back to back flow-through of risk was maintained without inconsistent findings or decisions. Built does so by reading the Construction Contract so as to confine the regime by its unilateral choice as to whether to be the moving party in a dispute. That construction is not commercially workable.

89 Built's claim for declarations should in any event be refused on discretionary grounds. Built seeks negative declarations, for the purpose of which it must 'exhaust the possibilities'⁴³ and show that there cannot possibly be Linked Claims or Linked Disputes in respect of the disputes the subject of the March 2025 NOD. Built has not discharged that onus. Furthermore, the subject of a declaration must be expressed in precise language. The breadth and imprecision of Built's case, particularly in the context of a negative declaration, weighs against the granting of relief. Built makes no attempt to identify with any precision 'the disputes the subject of the [March 2025 NOD]' as a result of which the ambit of the proposed declaration is obscure and ambiguous.

90 This Court has broad power to make declarations of the kind sought, but it must consider whether there is practical utility in doing so and whether the declarations sought relates to a question that is not purely theoretical.⁴⁴ That difficulty is compounded where the declaratory relief sought does not finally conclude the dispute between the parties.⁴⁵ Built's declarations would not finally determine the rights between the parties or conclude the dispute between them. The dealings between the parties show that Built is likely to continue to make claims against VCIP. All of the disputes concerning those alleged defects (whether between State-VCIP or VCIP-State) are at an early stage and it cannot be said that there are not potential claims or entitlements by Built, absent comprehensive and unconditional releases by Built.

⁴³ Citing *Hume v Munro (No 2)* (1943) 67 CLR 461, 474.

⁴⁴ Citing *Anjin No 13 Pty Ltd v Allianz Australia Insurance Ltd* [2009] VSC 371, [34].

⁴⁵ Citing *Integrated Lighting & Ceilings Pty Ltd v Philips Electrical Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 693, 702.

91 In respect of the alleged Linked Claims in VCIP's list of claims, VCIP submitted as follows:

- (a) In respect of the EOT Claim, Built's contention that its responses were 'defensive' did not assist in resolving whether it met the contractual definition of Linked Claim, noting that a Claim is defined to include an extension of time. Second, what gives rise to the sought extension is irrelevant; it does not change whether it is a Claim or Entitlement. Third, even if the underlying basis for the sought extension was relevant, it is wrong to say that it has fallen away with the withdrawal of the variation request. Fourth, the EOT had not been withdrawn as at 14 March 2025. Fifth, once it is accepted that there was a Linked Claim on foot as at 14 March 2025, the position is 'locked in' as at that date. To otherwise allow Built to approbate and reprobate was unworkable and inconsistent with cl 48A. In any event, Built continued to keep the claim alive after that date.
- (b) In respect of the Variation Claim, Built accepted that this was a Claim or Entitlement. Second, whether it was 'justiciable' is irrelevant if it falls within that definition. Third, Built also appeared to accept that it had not been withdrawn as at 14 March 2025. Fourth, as a consequence, cl 48A was engaged.
- (c) In respect of the Invalid Direction Claim, first, whether it was defensive or raised as a contention in support of a denial, was irrelevant. The contention regarding the validity of cl 30.3 was intertwined with Built's contentions regarding both cl 8 and the need for a variation direction. Built was seeking relief. Second, Built's response that a statement made in a letter is not a claim has no basis in the Construction Contract, and it disregards the language of 'potential' in the definition of Linked Claim, and the definition of Entitlement. Third, other than to say that Built's 9 December 2024 NOD was withdrawn, Built does not point to any other withdrawal. If it was a Linked Claim, it was on foot as at 14 March 2025 and cl 48A was engaged.

- (d) In respect of the Design Claim, first, Built's focus on the 'defensive' nature of the claim was meaningless. Second, Built has advanced positive contentions about breach by the State (or VCIP), and those contentions are capable of being the subject of declarations, or otherwise as amounting to 'relief' from liability or obligations under the Construction Contract. Third, Built ignores the language of 'potential' in its response. Fourth, other than to point to withdrawal of Built's 9 December 2024 NOD, Built did not point to any other withdrawal.
- (e) In respect of the Relief from Damages Claim, first, Built appeared to accept that it sought relief from its obligation to pay liquidated damages. Second, the contention that the claim was defensive is meaningless. Third, under the Construction Contract Built automatically becomes liable for liquidated damages upon Built having failed to achieve practical completion. Built is seeking relief from that obligation which is relief within the meaning of the Contract. Fourth, Built ignores the language of 'potential' in the definition of Linked Claim. Fifth, Built did not make any suggestion of withdrawal.
- (f) In respect of the Delay Claim, Built appeared to accept that it was a Claim at the time it was made, it ignored the language of 'potential' in the definition of Linked Claim. If regard is had to events post 14 March 2025, Built's refusal to provide a release highlight the 'potential' of this Claim.
- (g) In respect of the Relief from Rectification Claim, even if Built withdrew its request for a variation direction it is clear that it maintains its position that it is not obliged to perform rectification works unless a variation direction is issued. Built did not point to any withdrawal of that claim. Built's contention is an assertion of rights or an attempt to obtain relief.
- (h) In respect of the Compensation Claim, Built appeared to accept that this was a Claim, albeit one withdrawn on 20 June 2025. It follows that as at 14 March 2025 there was both a Linked Claim and a Linked Dispute. Post 14 March

2025, Built's response on withdrawal ignored the language of 'potential' and remained couched in terms of 'not pursued', which means it may still potentially pursue the Claim or Entitlement in the future.

- (i) In respect of the Rain Claim, Built's focus on 'defensive' was meaningless. The contention was an invocation of the prevention principle as a reason to be relieved from liability, which is a Claim or Entitlement.

Consideration

- 92 It is convenient to commence with some observations about the proposed form of relief.
- 93 It is apparent from the language of the proposed declarations that their intended purpose is to avoid the application of cl 48A of the Construction Contract to the claims and disputes described in the March 2025 NOD. This dispute is centrally concerned with whether, and if so, how, cl 48A applies to those claims and disputes.
- 94 It will be noticed that the March 2025 NOD states only that because the matters it raises *concern* Linked Claims and *give rise to* Linked Disputes, in accordance with sub-cl 48A.4(b), the Linked Disputes would not be progressed under the Construction Contract while the Linked Dispute is being resolved between the State and the Contractor under the Head Contract, and accordingly the running of time and the parties' relevant obligations under the Construction Contract will be suspended. The contractual position taken by VCIP under its NOD is thus narrower than the relief that Built now seeks, which extends the application of cl 48A in its entirety to the disputes and claims.
- 95 Separately, there is a disconformity between the language of the NOD and that of the proposed declarations. VCIP made clear that it does not contest that the claims described in the NOD are not themselves Linked Claims. It said that it has never contended that they are or were Linked claims; that the NOD does not make Linked Claims, but rather identifies disputes about existing claims. VCIP submitted that for that reason (among others) there is no utility in the Court declaring that the claims

described in the NOD are not Linked Claims, which would address a false issue. I will return to that question later in these reasons. The substantive contest, then, concerns whether the disputes described in the NOD are 'Linked Disputes'. The language of the proposed declarations addresses the contractual definition of Linked Disputes and asks whether the disputes described in the NOD *are or were* Linked Disputes. Although the NOD states that the matters raised by the notice 'give rise to' Linked Disputes, VCIP submitted that the disputes described in the 14 March 2025 NOD were not and are not Linked Disputes.

96 The Linked Disputes question itself requires consideration of whether Linked Claims were made, such that the relevant disputes can be described as 'relating to any disputes arising out of or in connection with a Linked Claim' (which is how the Construction Contract defines Linked Dispute, in part).

97 Built seeks declarations in a negative form to the effect that the disputes and claims described in the NOD were or are not of a particular character, with a specific contractual consequence (the non-application of cl 48A). Built must positively establish that the subject claims and disputes are not, on an objective and reasonable review of the parties' dealings that correspond to the descriptions in the NOD, Linked Disputes or Claims within the meaning of the Construction Contract.

98 The application of the contractual terms must be considered by reference to the facts comprising the parties' dispute about the modular cell defects and related issues. However, the proper construction of the Construction Contract may be addressed before considering the facts.

Contractual provisions

99 The defined terms 'Linked Claims' and 'Linked Disputes' are deployed only for the purposes of cl 48A. I will commence with the meaning of the term 'Linked Claims'. As defined and applied in cl 48A, the concept has several layers which must ultimately be understood together, once its individual parts are considered.

100 'Linked Claims' incorporates the defined term 'Claims'.⁴⁶ 'Claims' is defined broadly, and includes any 'claim action, demand or proceeding' of the relevant kind. A 'Claim' thus need not be an action or a proceeding. The subject matter for 'Claim' in sub-paras (a), (b) and (c) of the definition includes a claim under, arising out of, or in any way in connection with, the Construction Contract, including any direction of VCIP's representative. 'Claim' expressly includes a claim for payment of money or for an extension of time. But the term is not so limited. The defined term 'Claim' does not by itself exclude the possibility that a 'Claim' may comprise the pursuit of a positive assertion by Built that it is not required to comply with a direction by VCIP and is not liable for the consequences thereof. I say a positive assertion because I do not consider that the language of 'Claim' is apt by itself to encompass a bare denial. A bare denial may be contrasted with the advancement of allegations (whether factual or legal or both) in support of a refusal to give what the other party is seeking (for example, compliance with directions or the payment of damages). 'Claim' in that sense is the pursuit of an assertion that a state of affairs (factual or legal) exists, and that certain consequences follow. It is not to the point that at general law, as VCIP puts it, a bare denial might be understood as being coupled with an assertion that the other party must fail. It might equally be said that at general law a denial may have the more limited effect of simply putting the plaintiff to its proof.⁴⁷ In any event, the contractual language 'Claim' at least connotes the positive advancement of something the claimant (i.e. Built) wishes to obtain, although by reference to the term 'Claim' alone, it is not necessary in order for a Claim to be made that Built commence a proceeding or make a claim to relief.

101 By itself, a 'Claim' connotes more than the existence of a set of circumstances from which a claim might arise or be made in the future. That is, a 'potential claim' is to be distinguished from a claim. As discussed later, 'potential claim' is taken up in the definition of 'Linked Claim'.

⁴⁶ 'Claims' also has application in cl 47.

⁴⁷ *Samaan bht Samaan v Kentucky Fried Chicken Pty Ltd* [2009] NSWSC 1265, [5], citing *Warner v Sampson* [1959] 1 QB 297, 319.

- 102 A Linked Claim also includes an 'Entitlement or Potential Entitlement'. 'Entitlement' is defined to mean any rights, remedies, benefits, compensation, recovery or other relief. In ordinary speech 'relief' may be relief *from* an obligation, but 'entitlement' signifies something that the recipient is owed or to which that person has a right.
- 103 The defined term 'Linked Claim' has several elements.
- 104 First, a Linked Claim is a claim (or an entitlement) *by or of Built against* VCIP. That language is consistent with the notion of a Claim requiring more than a bare denial.
- 105 Second, a Linked Claim includes a potential claim and a potential entitlement. A 'potential claim' connotes the existence of the basis for a claim that is not yet advanced or crystallised. It thus qualifies 'Claim'. I will return to the significance of 'potential' claims later in these reasons.
- 106 Third, sub-paras (a), (b) and (c) assign subject matter to 'Linked Claim'.
- 107 To fall within sub-para (a), a Linked Claim must be one that 'arises out of or is in respect of the same or substantially similar facts or circumstances, actions or omissions as a Claim or potential Claim by, or Entitlement or potential Entitlement of, the Contractor against an Upstream Party arising out of or in connection with the PIE Program or an Upstream Document'. A Linked Claim that 'arises out of' a claim or potential claim (or entitlement) of VCIP will have a temporal or causal relationship with a claim by VCIP. However, a Linked Claim that 'is in respect of' the same or similar circumstances need not have such a relationship. In either case, the relationship between the claims contemplated by sub-para (a) requires that a claim or potential claim (or entitlement) by each of Built and VCIP be identifiable. Given the back-to-back or mirrored nature of the Head Contract and the Construction Contract, relationships between claims of the requisite kind may arise where Built has a claim that it is entitled to certain relief from the demands imposed by VCIP which reflect the same demands made of VCIP by the State. A single set of circumstances may give rise to claims or entitlements by both Built and VCIP. The

provision does not require an identity of claims or entitlements by or of Built and VCIP.⁴⁸

- 108 Neither party relied upon sub-para (b) of the definition of Linked Claim. It is likely that where Built initiates a Linked Dispute it will also constitute a Linked Claim within sub-para (b).
- 109 To fall within sub-para (c) a Linked Claim must 'arise out of or in connection with an Upstream Decision'. An upstream decision is defined as one that is made under an upstream document (which includes the Head Contract), to the extent that it relates to or is in connection with the construction contractor or the works. As the present circumstances illustrate, decisions made under upstream documents can affect the Works, the operation of the Construction Contract and the Construction Contractor (Built) very immediately, but they are made under contracts (or documents that concern contractual relationships) to which Built is not privy. 'Decision' is not defined and assumes its ordinary meaning; relevantly it is not limited to a decision attended by any particular formality or with defined contractual consequences. An upstream decision would include a decision by the State's representative to direct VCIP to take a step in relation to the works under the Head Contract, including to rectify defects.
- 110 It follows that whether Linked Claims have arisen in a dispute is not to be determined by identifying the point of origin of a dispute, broadly described. That error infected parts of Built's submissions in which it contended that no Linked Claims arose because the claims and disputes described in the March 2025 NOD 'originated in the State's upstream claims VCIP'. The same error was present in the submission that 'but for claims of the State and VCIP there would be no dispute between the parties'. Relatedly, it does not take the matter very far to describe a position taken by a party as 'defensive'. In complex contractual disputes of the present kind, that label may assume a chameleon-like quality.

⁴⁸ See the latter part of sub-para (a) of the definition of Linked Claim which commences with the words, 'whether or not ...'.

- 111 Before turning to Linked Disputes it is convenient to consider the treatment of Linked Claims in cl 48A. Built's relief and much of its submissions were addressed to cl 48A in the broad. Clause 48A supplies a dispute resolution mechanism for Linked Claims and Linked Disputes. Properly understood, it comprises several clauses which operate with respect to related but different subject matter, and which distinguish between Linked Claims and Linked Disputes.
- 112 Sub-clauses 48A.1, 48A.2 and 48A.3 impose obligations on Built where it intends to make or makes a Linked Claim against VCIP, including to give VCIP written notice to tell it why the claim is a Linked Claim and why it is bona fide; to submit documents and notices to assist VCIP to take reasonable steps to pursue the Linked Claim with the Principal under the upstream document; and to co-operate with VCIP in its pursuit of the Linked Claim. There are no equivalent obligation in respect of Linked Disputes. These provisions illustrate that a Linked Claim is at once a claim by Built against VCIP and a claim that is capable of pursuit by VCIP upstream.
- 113 Although a Linked Claim is defined to include a potential claim, for the obligations on Built in sub-cl 48A.1, 48A.2 and 48A.3 to take effect, there must exist an extant claim that Built is pursuing. It is clear from the context that cl 48A provides that the claim must be capable of being described in the information that Built is to provide to VCIP and capable of pursuit by Built with the Principal. Whilst it is not helpful to define in the abstract what might amount to a withdrawal of a claim, where a claim is no longer pursued there is, practically speaking, nothing to which the positive obligations in sub-cl 48A.1, 48A.2 and 48A.3 may attach. So much is also clear from the language at the commencement of sub-cl 48A.1 which is to the effect that despite cl 47, if Built *intends to or does make a Linked Claim against* VCIP, cl 48A shall apply and Built must do the things set out. As noted earlier, by reference to the term 'Claim' alone, it is not necessary that Built make a claim to relief. However, the language of the opening words of sub-cl 48A.1 and the nature of the obligations described in sub-cl 48A.1, 48A.2 and 48A.3 indicate that those obligations attach to a claim in which Built is seeking positive relief of some kind. By sub-cl 48A.5

and 48A.6 (which also apply to Linked Disputes) Built's entitlements (and VCIP's liability) in respect of Linked Claims, if any, is limited to such entitlements that are obtained by VCIP from the upstream party.

114 For completeness, I reject Built's contention that the opening words of sub-cl 48A.1 mean that cl 48A in its entirety only applies where Built is advancing a positive claim for relief. The opening words of sub-cl 48A.1 are a positive statement of Built's obligations when it does advance a Linked Claim, and not a limiting statement about the application of the whole of cl 48A. As noted, cl 48A contains clauses which address related but distinct subject matter. More particularly, those words do not carry the implication that when Built decides to no longer pursue a Linked Claim, the provisions in cl 48A concerned with Linked Disputes, cease to have effect.

115 The point is well illustrated by the communications between Built and VCIP, and VCIP and the State between 3 and 11 July 2025 (as set out above). Relying on Built's correspondence, VCIP told the State that it had been informed by Built that it was not pursuing or intending to pursue certain Linked Claims that were the subject of the March 2025 NOD, and that as to the EOT Claim and the contention that the State was obliged to issue a variation direction, 'there is no dispute to resolve'. The State told VCIP it would proceed on the basis that VCIP had withdrawn the claims described in its 8 July 2025 letter.

116 The State added in its letter to VCIP that VCIP's positive case continued to include allegations of fact that the modular cell design was deficient and caused the modular cell defects, and that the modular cells were poorly manufactured with systemic defects. It will be recalled that contentions to that effect have been advanced and consistently maintained by Built which, as a result, continues to insist that it is not obliged to rectify the modular cell defects. As VCIP's submissions emphasised, Built has not given releases in respect of any aspects of the dispute (broadly characterised), and its submissions made tolerably clear that in the future it might press what it does not presently press, in circumstances where the issue of modular

cell defects is the subject of the ongoing arbitration between VCIP and the State. I will return to this issue in the context of Linked Disputes.

117 There is one further matter in respect of Linked Claims. As Built put it, VCIP makes the erroneous contention that where VCIP passes onto Built claims made against it by the State, unless and until Built concedes VCIP's claims (and even if Built merely puts VCIP to its proof), any downstream claim which VCIP passes on from the State to Built is also a Linked Claim which engages cl 48A and all of the obligations within it, addressed to Built. It follows from the reasoning above that insofar as a proposition of that width is made by VCIP, I reject it.

118 The Construction Contract defined a Linked Dispute as a dispute which Built has initiated or to which it is a party, and which 'relates to any disputes arising out of, or in connection with, any Linked Claims'. Several things may be said about Linked Disputes.

119 First, Built must be a party to a Linked Dispute but need not initiate it. To be a party to a dispute Built must at least be resisting a claim or contention made against it by another party. Second, a Linked Dispute must 'relate to any disputes arising out of or in connection with any Linked Claim'. The parties' chosen language is not that a Linked Dispute must 'arise out of or in connection with a Linked Claim' or that it must be 'related to a Linked Claim'. Rather, it need only '*relate to any dispute arising out of or in connection with a Linked Claim*'. The connection between the Linked Dispute and the Linked Claim need not be a direct one. Further, the prepositional phrase 'relate to' is 'ordinarily of wide import'; the relationship between two things that it describes 'need not be causal or temporal'.⁴⁹ Absent any contrary indication from the text, 'it requires no more than a relationship, whether direct or indirect, between two subject matters'.⁵⁰

120 Second, this proceeding raises the question of the effect that Built withdrawing a Linked Claim has on a Linked Dispute.

⁴⁹ *R v MG* [2016] NSWCCA 304, [67].

⁵⁰ *O'Grady v Northern Queensland Co Ltd* (1990) 169 CLR 356, 376 (McHugh J).

121 Focusing on the definition of Linked Disputes and Linked Claims, it must be accepted that as a matter of contractual language, a Linked Dispute may relate to a dispute arising out of, or in connection with, a potential claim by Built which is a Linked Claim. Where Built has pressed and then withdrawn a claim, it may still have a potential claim that is a Linked Claim. Further, as a matter of practical reality it might follow, but will not *necessarily* follow, that where a Linked Claim is made and a Linked Dispute ensues and then Built withdraws its claim, the Linked Dispute will come to an end. The outcome might depend, for example, on the terms on which Built decides to withdraw its claim. A Linked Dispute may have other dimensions beyond the compass of Built's claim which nevertheless concern Built to the extent that it remains a party to the dispute. Nor does it follow by reason of the logic inherent in the contractual language that where a Linked Claim is withdrawn, no Linked Dispute can exist. As noted earlier, a Linked Dispute need only have an indirect relationship with a Linked Claim.

122 Turning to cl 48A, Linked Disputes are the subject of sub-cl 48A.4, 48A.5 and (in a more limited way) sub-cl 48A.6. For the reasons given, I agree with VCIP's submission that once a dispute is properly characterised as a Linked Dispute it does not lose that characterisation upon Built withdrawing its Linked Claim against VCIP or purporting to do so. As VCIP submitted, the implication of a downstream party (i.e. Built) making and then withdrawing a claim is addressed by the combined effect of sub-cl 48A.4 and 48A.5(b). By sub-cl 48A.4 a Linked Dispute must be conclusively resolved 'upstream', it will not be progressed under the Construction Contract while it is being resolved between VCIP and the upstream party, and the running of time under which the parties' obligations to comply with the relevant provisions of the Construction Contract to which that Linked Dispute relates will be suspended. By sub-cl 48A.5 Built is bound by the result achieved with the upstream party of a Linked Dispute.⁵¹ It may happen that a Linked Dispute will resolve more quickly or differently once Built withdraws its claim, but the contractual terms do

⁵¹ By sub-cl 48A.6, VCIP's liability to Built is correspondingly limited in those cases where a Linked Dispute would give rise to an entitlement in Built's favour. That sub-clause will likely only have application where Built is pursuing a claim, i.e. where it is the party initiating the Linked Dispute.

not themselves dictate that result. A Linked Dispute need not be coextensive with a Linked Claim.

- 123 Sub-clauses 48A.4, 48A.5 (and to the extent it applies, sub-cl 48A.6) may be understood as a contractual mechanism to deal with the potential for inconsistent findings with consequential rights and obligations that would otherwise arise. A Linked Dispute is one that relates to a dispute arising out of or in connection with a Linked Claim. It will accordingly have a relationship (of the kind described) to a claim by Built, and also to a claim involving upstream parties. The evident commercial rationale for these provisions is that where the Head Contract and Construction Contract are so closely tied – where they concern the delivery of the very same works, which VICIP has sub-contracted to Built – disputes involving a common factual substratum and consequential rights and obligation should be resolved consistently. Differently put, it is inimical to the functional operation of the Construction Contract which is tied in the ways discussed to the Head Contract, for such disputes to be resolved inconsistently, and in competing or parallel forums. That commercial rationale is consistent with the language and objects of the Construction Contract as a whole, understood in its commercial context. Built emphasised the harshness of it being bound by the result of a dispute resolution process that does not give it a ‘seat at the table’. Built’s submission that it should only be bound by a determination of an issue where it is actively pursuing a Linked Claim that it has formulated itself is not persuasive. A claim that Built actively pursues might be of considerable importance to it, but it is nevertheless not granted a seat at the table at which that Linked Claim will be resolved between VICIP and the upstream party, so to speak. If that is a harsh result, it applies by reason of the plain terms of the Construction Contract.

March 2025 NOD Linked Claims and Disputes

- 124 The proposed declarations separately addressed Linked Claims and Linked Disputes. Built proposed alternative forms of declaration. One version addressed both relevant points in time (March 2025 and September 2025) and the other

addressed only September 2025. Leaving the form of relief to one side, I will consider the dates separately.

Linked Claims

125 The proposed declaration regarding Linked Claims relevantly read:

The claims described in the [March 2025 NOD] were not as at 14 March 2025, and are not as at September 2025, 'Linked Claims' within the meaning of that term in the Construction Contract, and cl 48A of the Construction Contract has no effect in relation to the claims so described. (emphasis added)

126 The alternative form of declaration was in the same form, but limited to September 2025.

127 This aspect of Built's application need only be addressed briefly. I accept that it was clear at least by the time VCIP filed its submissions in advance of the trial (and possibly before that time) that VCIP did not contend that the claims or disputes described in the March 2025 NOD were themselves Linked Claims. The NOD itself did not make that claim. The relief that Built formulated was addressed to facts that were not in contention. Built re-formulated its proposed declarations during and after the trial, but retained the relevant parts of its text. It is not for the Court to notionally re-fashion the relief sought, supposing the relief to be concerned with whether the claims described in the NOD might have some other relationship to Linked Claims. Whether they do was raised in the declarations addressed to Linked Disputes (discussed below), but that is a separate matter. As discussed below, as a discretionary consideration, an exercise of the Court's power to make a declaration must have utility: a declaration must answer a real question which requires consideration of whether it will result in real and foreseeable consequences for the parties, directed to resolving the parties' dispute or an aspect of it. The declarations addressed to 'Linked Claims' do not meet that description. A declaration concerning an issue not in contest is not a real question for determination. The second clause within the proposed declaration, '*and cl 48A ... has no effect in relation to the claims so described*', is tied to the first and is intended to be a consequence of the conclusion that the claims described in the NOD are not Linked Claims. Accordingly, it

addresses an asserted consequence of a fact not in contention. While it is true that the parties have been at odds about the application of cl 48A there is, again, no warrant for the Court refashioning the relief and making a declaration addressed to only part of the proposed text.

128 These conclusions apply as at both relevant points in time.

Linked Disputes

129 The proposed form of relief reads:

The disputes described in the [March 2025 NOD] did not as at 14 March 2025 and do not as at 25 September 2025, relate to any disputes arising out of or in connection with any 'Linked Claims' and therefore not 'Linked Disputes' within the meaning of those terms in the Construction Contract, and cl 48A of the Construction Contract has no effect in relation to the disputes so described.⁵²

130 Did the disputes described in the March 2025 NOD relate to any disputes arising out of, or in connection with, any Linked Claims? Drawing on the analysis of the contractual framework set out earlier, that question may be answered by (1) identifying any Linked Claims in existence as at 14 March 2025; (2) describing disputes, if any, arising out of or in connection with the Linked Claims; (3) considering the disputes described in the NOD; and (4) asking whether those disputes are 'related to' any disputes arising out of, or in connection with, any of the Linked Claims. I will consider the position as at March 2025 and September 2025 in turn.

March 2025

131 As at 14 March 2025, Built had made a Linked Claim against VCIP for an extension of time for practical completion of SP2 under the Construction Contract, with related delay costs (the EOT Claim).⁵³

⁵² The alternative form of relief was in the same form but limited to September 2025.

⁵³ In its list of claims (above) VCIP separately defined the EOT Claim and the Delay Claim but they can be addressed together for present purposes.

132 In relation to the EOT Claim, as set out earlier:

- (a) By letter to VCIP of 8 July 2024, Built claimed an extension of time for practical completion under cl 35.5 and part 41B of Annexure Part A of the Construction Contract. Built stated that practical completion of SP2 had not been achieved because of certain defects identified in the modular cells.
- (b) In its 8 July 2024 letter, Built said that VCIP's failure to provide a variation direction meant that Built did not know what, if any, rectification work it was required to carry out, and that failure was delaying the achievement of practical completion of SP2. In numerous subsequent letters to VCIP, Built renewed and extended its claim for an extension of time for practical completion. In other earlier and subsequent correspondence, Built consistently alleged that it was not responsible for causing or rectifying the modular cell defects which were the responsibility of VCIP, the State, or both.
- (c) By a further letter (notice) of 8 July 2024 Built restated and elaborated upon those contentions. It said that VCIP was liable for the cost of the work required to investigate and remediate the defects in the modular cells and for the delay impact and 'must provide a variation direction' to Built, identifying the scope of the works it required Built to carry out.
- (d) Built said that 'the subject of' its 8 July 2024 notice was a Linked Claim for the purposes of cl 48A of the Construction Contract. In giving reasons for that statement, Built said that correspondence exchanged on the matters that were the subject of the notice had been passed up by VCIP to the State; that Built's June 2024 notice (in which it had originally given notice of a claim) had been reproduced by VCIP to the State; that the contractual provisions relied upon in Built's 8 July 2024 notice were replicated in the Head Contract, 'placing the Principal with ultimate liability in respect of the matters raised in this notice'; and that the matters in the notice related to the completion of SP2, which is a common milestone in the Construction Contract and the Head Contract.

(e) Built's EOT claim was the subject of its 9 December 2024 NOD.

133 Built's claim for an extension of time and delay costs was a claim by it against VCIP for a remedy under the Construction Contract. It arose out of, or in connection with, an upstream decision, namely a decision by the State (the Principal) under cl 30.3 of the Head Contract on 2 September 2023 to direct VCIP to correct the modular cell defects. VCIP gave a corresponding direction to Built under cl 30.3 of the Construction Contract on 21 December 2023, directing it to rectify all modular cell defects identified by the Principal. Built responded to VCIP's notice variously, including by its claim for an extension of time, denying it was responsible for fixing defects and thereby refusing to comply with the direction. Those facts were sufficient for Built's claim to constitute a Linked Claim. It is unnecessary to go further but I would add that the EOT Claim also arose in respect of the same or substantially similar facts or circumstances as a potential and then actual claim by VCIP against the State for equivalent relief. VCIP made such a claim by its notice to the State of 17 July 2024.

134 As the ensuing correspondence discloses, a dispute arose out of or in connection with Built's EOT claim, to which Built was a party. The State refused VCIP's claim for an extension, and VCIP in turn refused Built's claim. The State steadfastly maintained its position that Built and VCIP bore responsibility for the modular cell defects. Built has steadfastly taken the opposite position. Built maintained its EOT Claim until June 2025.

135 Built had also made a Linked Claim that it was entitled to a variation direction for works required to rectify defects in the modular cells:⁵⁴

(a) On 31 May 2024, Built wrote to VCIP, stating that the purpose of the letter was 'to request that a variation direction be issued for works required to rectify defects in the modular cells and damage resulting therefrom, which are the responsibility of the contractor and which do not currently fall within

⁵⁴ The Variation Claim in VCIP's list of claims (above).

the scope of works to be performed by Built under the Construction Contract'. Built said that the defects had been caused by poor design and manufacturing and that the rectification works required to overcome the defects were not within the scope of the works that Built was required to carry out in the absence of a variation direction. If Built was to undertake that work a variation direction should be made and should include the 'extensive' work that Built had carried out at its costs since September 2023.

- (b) By its 8 July 2024 notice, Built gave notice under cl 46.1 of the Construction Contract that a Claim had arisen, saying that the claim 'relates to the contractor's ongoing failure to provide the construction contractor with the necessary variation direction on the scope of the rectification works which the contractor requires the construction contractor to carry out'. As noted above, it described the matters that were the subject of that notice as a Linked Claim.
- (c) Built's claim for a variation direction was the subject of its 9 December 2024 NOD.

136 The claim for a variation direction was a claim by Built against VCIP, seeking from it a direction as a condition of Built doing the work that VCIP had directed it to do, and in order to proceed to practical completion. Like the EOT Claim, it arose out of, or in connection with, an upstream decision, namely a decision by the State (the Principal) under cl 30.3 of the Head Contract on 2 September 2023 to direct VCIP to correct the modular cell defects. VCIP gave a corresponding direction to Built under cl 30.3 of the Construction Contract on 21 December 2023, directing it to rectify all modular cell defects identified by the Principal. Built responded to VCIP's notice including by its claim for a variation direction. Those facts were sufficient for Built's claim for a variation direction to constitute a Linked Claim. Like the EOT Claim, it also arose in respect of the same or substantially similar facts or circumstances as a potential and then actual claim by VCIP against the State for equivalent relief. VCIP made such a claim by its notice to the State of 17 July 2024.

137 A dispute arose out of, or in connection with, Built's claim for a variation direction, to which Built was a party. The State refused VCIP's claim for a direction, and VCIP in turn refused Built's claim. The State steadfastly maintained its position that Built and VCIP bore responsibility for the modular cell defects. Built has steadfastly taken the opposite position. Built maintained its claim for a variation direction until it reversed course in March 2025 when it sought to bring the dispute within the cl 47 regime under the Construction Contract. Built said at that time (and submitted before this Court) that the claim for a variation direction was 'not justiciable', meaning that it was not something it could demand from VCIP or obtain by Court order. It applied the same characterisation of 'the time and cost implications' described in Built's 9 December 2024 NOD.⁵⁵ Built did not however, accede to VCIP's direction to rectify the modular cell defects or accept that it was required to do so within the scope of the contractual works.

138 Among other things the March 2025 NOD raised the following disputes (as expressed in the terms of the NOD):

- (a) A dispute under cls 16.2 and 30.3 of the Construction Contract in relation to defective work and material.⁵⁶ The NOD stated that there was a dispute as to whether Built failed to rectify defective works or material, or loss or damage to the work, under the Construction Contract at its costs, in accordance with cls 30.3 and 16.2; that Built had not done the work as directed; and that Built denied its obligation to rectify the defective work identified in the notices and had told VCIP it would not comply with the directions. It stated that Built was required to comply with the directions to rectify.
- (b) A dispute under cl 33.1 of the Construction Contract in relation to Built suspending the works and failing to proceed with due expedition and without delay.⁵⁷ The NOD stated that Built was obliged to proceed with due expedition and without delay and not to suspend the progress of work; that

⁵⁵ See Built's letter of 28 March 2025, above.

⁵⁶ March 2025 NOD [3]-[14].

⁵⁷ March 2025 NOD [15]-[18].

Built had not rectified the identified defective works; that Built denied its obligation to rectify the defective work and advised VCIP it did not intend to comply with the directions in those notices; and that Built failed to comply with VCIP's directions and advised VCIP that it would not commence the work required by those notices. It stated that accordingly, Built had invalidly suspended the progress of part of the work under the contract, in breach of cl 33.1, and failed to proceed with expedition under cl 33.1.

- (c) A dispute under cls 35.1 and 35.6 of the Construction Contract in relation to delay to practical completion of SP2, and whether Built owes liquidated damages to VCIP. The NOD stated that Built had not achieved practical completion and was indebted to VCIP for liquidated damages.
- (d) Disputes related to the above, in which VCIP alleged substantial breaches of the Construction Contract by Built.

139 The disputes described in the March 2025 NOD (as set out above) can each be said to *relate to* disputes arising out of, or in connection with, the EOT claim and the Variation Claim, which were Linked Claims. Each concerns directly related subject matter and directly related contractual implications.

140 Those disputes arose in circumstances where all parties accepted that practical completion of SP2 could not be achieved until the modular cell defects (among other defects) had been rectified. At their core, the disputes (those described in the NOD and those arising in connection with the EOT Variation Claims) concern two issues. On the one hand, whether, within the existing scope of its contractual obligations, Built is required to comply with VCIP's directions to rectify and proceed with the works to reach practical completion. On the other hand, whether VCIP cannot require Built to do so, unless it varies the scope of the works by direction and, relatedly, grants an extension of time for practical completion and compensates Built by paying delay damages. Built's claim that it was entitled to an extension of time and damages is founded on the proposition that the cause of it failing to reach

practical completion of SP2 lay with VCIP and the State. Cognate questions arise under the Head Contract between VCIP and the State.

141 The March 2025 NOD accordingly described Linked Disputes.

142 Built's arguments against that conclusion are unpersuasive.

143 On 28 March 2025, Built wrote to VCIP that Built's contention that it required a variation direction in order to complete rectification works was 'non justiciable' and that the same thing could be said of 'the time and costs implications', meaning the EOT claim. Built said that its requests were not claims but 'assertions made in defence of the claims made by the State and [VCIP]'. Built went on to withdraw its 9 December 2024 NOD and to say in June and July 2025 that the claims were not pressed.

144 For the reasons give earlier, characterising Built's claims as 'defensive', and pointing to the State's claims that the works were defective as the origin of the overall dispute, does not change their character as 'Claims' or 'Linked Claims'. Nor does Built's revised characterisation of its claims being non-justiciable. It was not necessary for the purposes of this proceeding to determine whether Built was correct about its claim for a variation direction, and neither party said that that question should be resolved in this forum. However, several things may be said about Built's submission. First, until it changed position, Built plainly and consistently advanced its claims for an extension of time, delay damages and a variation direction which were each Linked Claims, for the reasons given earlier. Second, Linked Claims are defined to include 'Entitlements' but they also include 'Claims'. A claim is an assertion of the kind discussed earlier. It may be sound or unsound. The fact that a party withdraws a claim or later comes to be view that the claim was unfounded or asserts as much for its own reasons, does not mean that the claim was never made. Third, Built's claims were addressed squarely to the contractual impasse that embroiled Built, VCIP and the State. The works could not progress without Built (and in turn VCIP) agreeing or being required to attend to the alleged defects. The

contractual impasse has not been resolved and despite changing its position, Built has not accepted that it must progress the works. Its position in that respect remained consistent.

145 It follows that Built has not established a basis for the declaration it seeks in respect of Linked Disputes as at March 2025.

146 It is unnecessary to address the remaining claims advanced by Built and identified in VCIP's submissions.

Linked Disputes – as at September 2025

147 The position as at September 2025 can be addressed succinctly.

148 As set out earlier, Built withdrew its 9 December 2024 NOD and told VCIP in correspondence in March 2025 through to July 2025 that it did not press its claims.

149 For the reasons given earlier, it does not follow from the contractual language concerning Linked Claims or from its inherent logic that where a Linked Claim is withdrawn, no Linked Dispute can exist. Once a dispute is properly characterised as a Linked Dispute, it does not lose that characterisation upon Built withdrawing its Linked Claim against VCIP or purporting to do so. The facts of this case illustrate the force of that reading of the Construction Contract. The central contentions raised in the March 2025 NOD have not been resolved. Related questions are presently in contest between VCIP and the State. The fundamental contractual impasse remains unresolved despite Built not presently pressing its claims. Furthermore, Built still has potential claims including for an extension of time and delay damages. It has not disclaimed that it may in the future re-animate those claims.

150 It will be recalled that in the March 2025 NOD, VCIP stated that

in accordance with clause 48A.4(b) the Linked Disputes will not be progressed under the Construction Contract while the Linked Dispute is being resolved between the State and the Contractor under the Head Construction Contract, and the running of time under, and the parties' obligations to comply with, the relevant provisions of the Construction contract to which the Linked Dispute relates are suspended.

151 That provision of the Construction Contract applied to the Linked Disputes and did not cease to apply after Built gave notice that it did not press its claims. The practical outcome is that while the related dispute between VCIP and the State is being resolved, the Linked Disputes will not be progressed under the dispute resolution process under cl 47 of the Construction Contract.

152 It follows that Built has not established a basis for the declaration it seeks in respect of Linked Disputes as at March 2025. Built's application for declarations in respect of Linked Claims and Linked Disputes is refused.

Part C – Sections 13 and 48 of the SOP Act

153 In the alternative to its case concerning Linked Claims and Linked Disputes, Built sought declarations concerning the relationship between cl 48A of the Construction Contract and ss 13 and 48 of the SOP Act, in the following terms:

Clause 48A of the Construction Contract is of no effect in relation to any 'Linked Claims' or 'Linked Disputes' described in the [March 2025 NOD] by reason of s 13 of the *Building and Construction Industry Security of Payment Act 2002* (Vic), or cl 48A of the Construction Contract is [alternatively, clauses 48A.2, 48A.4, 48A.5 and 48A.6 of the Construction Contract are] void by reason of s 48 of that Act.

The proposed declaration comprised two alternatives, namely that by reason of s 13 of the SOP Act, cl 48A was of no effect in relation to the described Linked Claims and Linked Disputes described in the NOD, or that by reason of s 48 of the SOP Act, cl 48A, or parts of it, were void. I will deal with the alternatives separately.

The SOP Act, s 13

154 Section 13 of the SOP Act provides:

Effect of pay when paid provisions

- (1) A pay when paid provision of a construction contract has no effect in relation to any payment for –
 - (a) construction work carried out or undertaken to be carried out under the contract; or
 - (b) related goods and services supplied or undertaken to be supplied under the contract.

(2) In this section –

money owing, in relation to a construction contract, means money owing for –

- (a) construction work carried out under the contract; or
- (b) related goods and services supplied under the contract;

Pay when paid provision of a construction contract means a provision of the contract –

- (a) that makes the liability of one party (the first party) to pay money owing to another party (the second party) contingent on payment to the first party by a further party (the third party) of the whole or any part of that money; or
- (b) that makes the due date for payment of money owing by the first party to the second party dependent on the date on which payment of the whole or any part of that money is made to the first party by the third party; or
- (c) that otherwise makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract.

155 Built submitted that:

- (a) By s 13(2)(c) a ‘pay when paid’ provision of a construction contract is one that makes the liability to pay money owing, or the due date for money owing, contingent or dependent on the operation of another contract. The proper approach to determining whether a contractual provision is captured by one of the sub-sections within s 13 is to focus on the provision of the contract and ask ‘whether on its proper construction, the provision “makes the liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract”’.⁵⁸ By reference to the decisions of the High Court in *Maxcon Constructions Pty Ltd v Vadasz*⁵⁹ and this Court in *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd*,⁶⁰ s 13 is to have a broad application. *Lal Lal Wind Farms*

⁵⁸ *Maxcon Constructions Pty Ltd v Vadasz* (2018) 264 CLR 46, 57 [27].

⁵⁹ *Maxcon Constructions Pty Ltd v Vadasz* (2018) 264 CLR 46.

⁶⁰ *Lal Lal Wind Farms Nom Co Pty Ltd v Vestas – Australian Wind Technology Pty Ltd* [2021] VSC 807.

establishes that it is not necessary to identify a 'payment' in order for s 13 to apply.

- (b) Section 13(2)(c) of the SOP Act applies to render cl 48A of no effect because claims made by Built cannot progress while they are being resolved between VCIP and the State, by operation of sub-cl 48A.4(b). Furthermore, sub-cl 48A.5(a)-(b) and 48A.6(a) made the existence of Built's entitlement to payment and the quantum of that entitlement contingent on VCIP's entitlement under the Head Contract. Because the arrangements in the Head Contract dictated the quantum of Built's entitlement under the Construction Contract, 'the operation of s 13(2)(c) of the SOP Act is triggered' and 'cl 48A has no effect in relation to [Built's] payment entitlements'.
- (c) The declaration is not addressed to a hypothetical scenario. There is an extant dispute between the parties about work under the construction contract. The declaration is addressed to the enforceability of a provision of the contract. The declaratory relief will have a real and final effect on the application of cl 48A of the contract. Built accepts that it cannot identify any progress claim that is the subject of a dispute or that is addressed in the March 2025 NOD. However, this declaration (being Built's alternative case) is addressed to circumstances in which it is assumed that Built has made Linked Claims. On VCIP's own case, Built was seeking a variation and extension of time, and remuneration. On the assumption that Built had made Linked Claims, it would be seeking relief, including claims for money, which would constitute a payment claim and attract the operation of s 13.

156 VCIP submitted that:

- (a) In making a declaration, the Court's discretion is governed by matters including whether there is practical utility and whether the declaration sought relates to a question that is not purely theoretical.⁶¹ Another bar to

⁶¹ Citing *Integrated Lighting & Ceilings Pty Ltd v Philips Electrical Pty Ltd* (1969) 90 WN (Pt 1) (NSW) 693, 702.

discretionary relief is if the declaration does not finally conclude the dispute between the parties. Built's relief is directed to a hypothetical scenario which would not resolve any contest between the parties. Section 13 of the SOP Act has operation in relation to payments. There was no payment claim on foot. Built did not identify the 'payment for construction work' or 'payment for related goods and services' affected by cl 48A in a way that engages s 13 of the SOP Act.⁶² Built sought only to establish that cl 48A *might* engage s 13 (or s 48 for that matter) in some hypothetical circumstance divorced from the present case, in order to establish the result that cl 48A was ineffective or invalid for all purposes, including the issues raised in the NOD which were not concerned with the regime established by the SOP Act.

- (b) Section 13 only applies to statutory entitlements to payments under the SOP Act, which is apparent from the use of the defined terms 'money owing', 'construction work' and 'related goods and services'.
- (c) Clause 48A did not make VCIP's liability to pay money owing to Built contingent upon the Head Contract in that 'money owing' is money owing for construction work carried out under the contract, and Built identified no 'money owing'. Further, cl 48A concerned determination of disputes which do not themselves create liability.
- (d) Even if s 13 rendered cl 48A ineffective in relation to some payments, that does not mean cl 48A was ineffective in all circumstances.

Consideration

157 Section 13 of the SOP Act does not operate to declare 'pay when paid' provisions void. It is concerned with the effect of contractual 'pay when paid' provisions upon payments for construction work (or goods and services supplied) carried out under construction contracts, declaring such provisions to be of no effect *in relation to such payments*. In determining whether s 13 has application it is therefore necessary to pay

⁶² Citing *Ainsworth v Criminal Justice Commission* [1992] HCA 10, [38]; 175 CLR 564, 581-2 (Mason CJ, Dawson, Toohey and Gaudron JJ).

attention both to the character of the contractual provision and to the payment in issue. So much is apparent from the text of s 13. The operation of s 13 of the SOP Act is illustrated by the two decisions to which Built referred.

- 158 In *Maxcon Constructions* the High Court considered s 12 of the *Building and Construction Industry Security of Payment Act 2009* (SA) which is in the same term as s 3 of the SOP Act. There, the builder retained a sub-contractor. The sub-contract permitted the builder to retain, by way of security, a retention sum corresponding to five percent of the contract sum. When the sub-contractor submitted a progress payment claim the builder provided a payment schedule indicating that it intended to deduct a retention sum from the progress payment. The sub-contract provided that the retention sum was to be released at defined points in time after the completion of certain works and the issue of certificates, including under the head contract between the builder and its client the landowner.⁶³ An adjudicator determined that that the retention provisions in the sub-contract were 'pay when paid' provisions which were ineffective under s 12 because they made the liability of the builder to pay money to the contractor, or the due date for payment of that money, contingent or dependent upon the operation of another contract. Accordingly, by operation of s 12(1) the builder was not entitled to deduct the retention sum from the progress payment. The High Court upheld the adjudicator's decision that the sub-contract provisions were 'pay when paid' provisions. The plurality said, of the proper approach to s 12(2)(c) (the equivalent of s 13(2)(c) of the SOP Act):

[Section] 12(2)(c) focuses on a provision of a contract and asks whether, on its proper construction, the provision 'makes liability to pay money owing, or the due date for payment of money owing, contingent or dependent on the operation of another contract'. Here, the retention provisions did just that: they made the due days for payment contingent on 'CFO' [certificate of occupancy]. And ... CFO required satisfactory completion of the head contract before release of the retention sum could be calculated, let alone for the retention sum to be released.⁶⁴

⁶³ *Maxcon Constructions*, 55-6 [18]–[26] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

⁶⁴ *Maxcon Constructions*, 57 [27] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

159 It will be noticed that whilst the High Court was concerned with whether the contractual term was a 'pay when paid' provision, the result was that s 12 took effect in relation to the payment claim in issue, with the result that the builder could not deduct the retention sum from the payment.

160 In *Lal Lal Wind Farms* Stynes J considered whether a reference date for the purposes of a payment claim was to be determined under the parties' contract or under s 9(2)(b) of the SOP Act. The answer to the question turned on whether the relevant clause of the contract was of no effect under s 13 of the SOP Act.⁶⁵ Relevantly, cl 11.1(c) of the construction contract provided:

Within 5 business days after the last day of each quarter of each Operational Year ... [the contractor] is entitled to submit to the [the principal] a valid tax invoice which states the portion of the Interim Fees or O&M Fees (as applicable) payable by [the principal] ...⁶⁶

161 Applying the reasoning of the High Court in *Maxcon Constructions*, Stynes J held that cl 11.1(c) was a 'pay when paid' provision, because the contractor's entitlement to submit a tax invoice, which was the precondition of the principal's liability to pay money owing, was contingent on practical completion occurring in another contract. Accordingly, s 13 of the SOP Act rendered cl 11.1(c) of the contract of no effect in relation to any payment.⁶⁷ The principal had submitted that cl 11.1(c) could not be a 'pay when paid' provision, because there was no 'money owing' when cl 11.1(c) was engaged, and that clause merely determined when the contractor could issue an invoice.⁶⁸ The Court rejected that submission, saying that a provision which makes the entitlement to issue an invoice and thereby the existence of liability to pay money owing (and the due date for payment of money owing), contingent on the operation of another contract, is captured by s 13(2)(c).⁶⁹ That reasoning goes no further than to say that a clause can be construed as a 'pay when paid' provision if there is no 'money owing' at the point in time the clause was engaged, so long as the offending

⁶⁵ *Lal Lal Wind Farms*, [75]. It was unnecessary to decide whether the clause was void under s 48 of the SOP Act.

⁶⁶ *Lal Lal Wind Farms*, [19].

⁶⁷ *Lal Lal Wind Farms*, [86]–[91].

⁶⁸ *Lal Lal Wind Farms*, [82].

⁶⁹ *Lal Lal Wind Farms*, [92].

clause makes the liability to pay money owing contingent on another contract. Stynes J said nothing about s 13(1) applying in the absence of a 'payment'.

162 Section 13 contains two limbs. First, s 13(1) provides that 'pay when paid' provisions have *no effect in relation to a payment for construction work or goods and services*, and second, s 13(2) defines 'pay when paid' provisions. Built's submissions did not properly engage with the first limb of s 13.

163 Built's proposed declaration was that cl 48A of the Construction Contract is of no effect *in relation to any Linked Claims or Linked Disputes described in relation to the [March 2025 NOD]*. Even assuming cl 48A to be capable of taking effect as a 'pay when paid' provision in some circumstances, Built did not establish that the March 2025 NOD described any payment for construction work (or goods or services) to be supplied under the Construction work. There was no payment in relation to which s 13(1) could take effect. The subject matter of the notice of dispute has been described at length, earlier in these reasons. No part of the notice of dispute concerned any payment claim. Built was not able to point to any payment claim having been made, or as the subject of any dispute.

164 Built's submission that sub-cl 48A.5(a), 48A.5(b) and 48A.6(a) 'make the existence of Built's entitlement to payment and the quantum of that entitlement contingent on VCIP's entitlement under the Head Contract' was entirely abstract. Its submission that its proposed relief was addressed to an extant dispute and concerned the enforceability of a provision of the Contract did not address the plain language of s 13(1) of the SOP Act which discloses the intended scope of its operation. Built did not go so far as to say that any 'extant dispute' concerning any Linked Claims and Linked Disputes described in the March 2025 NOD was a dispute about a payment for construction work within the meaning of s 13(1). Built's contention that a money claim by Built in the future for work done would or could itself be a Linked Claim that would in turn engage s 13, was expressed in very general terms and addressed to entirely hypothetical circumstances. As VCIP submitted, Built impermissibly sought to establish that cl 48A *might* engage s 13 in hypothetical circumstance

divorced from the present case, to establish the result that cl 48A is ineffective for all purposes, including the issues raised in the March 2025 NOD which are not concerned with the regime established by the SOP Act.

165 Having regard to the principles concerning the exercise of discretion to grant declaratory relief, which are set out below, the proposed declaration would have no real utility, directed as it was to hypothetical circumstances.

166 Built's application for declaratory relief in respect of s 13 of the SOP Act is refused.

The SOP Act, s 48

167 Section 48 of the SOP Act provides:

48 No contracting out

- (1) The provisions of this Act have effect despite any provision to the contrary in any contract.
- (2) A provision of any agreement, whether in writing or not –
 - (a) under which the operation of this Act is, or is purported to be, excluded, modified or restricted, or that has the effect of excluding, modifying or restricting the operation of this Act; or
 - (b) that may reasonably be construed as an attempt to deter a person from taking action under this Act –

is void.

168 Built submitted that:

- (a) The arrangements in cl 48A purported to exclude, modify or restrict the operation of the SOP Act, or can reasonably be construed as an attempt to deter it from taking action under the Act. This is so because 'when there is a Linked Claim' (meaning when a payment claim is also a Linked Claim) Built's entitlement to payment in respect of its claims was suspended (by sub-cl 48A.4(b)), the due date for payment of its entitlements was deferred (by sub-cl 48A.4(b)), the quantification of its entitlement depended upon a resolution of VCIP's corresponding claim in the Head Contract (by sub-cl 48A.5(a), 48A.6(a), and 48A.6(b)) and Built's involvement in the

dispute resolution process specified under the Head Contract was constrained (by sub-cl 48A.1(d) and 48A.5(d)). For the same reasons, cl 48A may also be reasonably construed as an attempt to deter a person from taking action under the SOP Act. Accordingly, cl 48A is rendered void by reason of s 48 of the SOP Act, and so rendered void for all purposes. Whilst it is unnecessary to limit the grant of declaratory relief to certain parts of cl 48A, at the very least, sub-cl 48A.2, 48A.4, 48A.5 and 48A.6 of the Construction Contract have the relevant effect, and are void.

- (b) In order to avoid the conclusion that cl 48A excluded or restricted the operation of the SOP Act, VCIP read cl 48A together with cls 53 and 49 of the Construction Contract. Doing so does not assist. Clause 49 contained a statement of a common law principle for interpreting contracts and otherwise operated to sever clauses that are illegal or unenforceable. It is of no assistance in the present context, and does not allow words to be read into the contract. Clause 53 simply supplied mechanical provisions for the service of notices, prescription of notice and the like, which apply if the SOP Act applies. There was nothing in those clauses removing the scope of operation of the SOP Act from the reach of cl 48A.
- (c) VCIP's submission that s 48 only operated to render a contractual provision void insofar as it concerned a statutory entitlement to payment was unsupported by the text, context or purpose of s 48.⁷⁰
- (d) The proposed declaration did not address a hypothetical scenario; it was concerned with enforceability of a provision in an extant contract, and would be determinative of the any dispute to which the provision applied.

⁷⁰ Citing *Sharvain Facades Pty Ltd (administrators appointed) v Roberts Co (NSW) Pty Ltd* [2025] NSWSC 606, [55]-[56]

169 VCIP submitted that:

- (a) Section 48 of the SOP Act applies to provisions of a contract under which the operation of the SOP Act is or is purported to be, excluded, modified or restricted, or which have that effect. Built must identify the provision of the SOP Act that cl 48A excluded, modified or restricted. Implicitly, Built's case addressed s 9 of the SOP Act, under which a person who undertakes to carry out construction work under a construction contract is entitled to a progress payment under the SOP Act, on and from each 'reference date' under the contract. Built has not demonstrated that cl 48A operated to exclude, restrict or modify the operation of that provision (nor any other provision of the Act).
- (b) The SOP Act is fundamentally concerned with rights to progress payments. It creates a right to interim payment pending determination of the parties' final rights (i.e. 'pay now, argue later'). Those rights were not affected by cl 48A. Properly construed, including by reference to cl 53 of the Construction Contract, cl 48A said nothing about the rights to progress payments conferred by the SOP Act and was not intended to exclude, modify or restrict the operation of the SOP Act.
- (c) Under the Construction Contract, payment claims, which are interim claims, were paid under the mechanism provided in cl 42.1, which was to be read together with cl 53. As cl 42.1 provided, payments made pursuant to that clause were made without prejudice to the right of either party to dispute whether the amount so paid was properly due and payable. Clause 48A was not addressed to interim payments but with the pursuit and resolution of Linked Claims and Linked Disputes to conclusion, between VCIP and the upstream party. If a dispute about a party's final or ultimate entitlement to payment under the Construction Contract were properly considered a Linked Claim, it would be subject to cl 48A.

- (d) Further, nothing in cl 48A was an attempt to deter Built from taking action under the SOP Act. Action under the SOP Act means the submission of interim payment claims and referral to adjudication of those claims. Clause 48A did not prevent or seek to deter such action. Clause 48A may be contrasted with the contractual provisions in *Lal Lal Wind Farms*. By way of example, there was nothing in cl 48A that prevented a reference date from arising, and cl 53.4 provided that the reference date was the date prescribed by cl 42.1.
- (e) To the extent that there was any ambiguity about cl 48A, by reference to cl 49 of the Construction Contract (and under the common law), a construction resulting in all provisions of the contract being enforceable is to be preferred.
- (f) Built's claim was addressed to hypothetical dispute about Built's entitlements to payments under the SOP Act attracting the operation of cl 48A, and in turn, attracting s 48 of the SOP Act. There is no progress payment in fact in dispute. There is no evidence that any of Built's payment claims under the SOP Act were impeded, deterred or affected in any way by cl 48A. Built's case was concerned with an extreme and unlikely scenario, given the clarity of the SOP Act and the result of proper construction of cl 48A. There is no occasion for a grant of declaratory relief.

Consideration

170 Built seeks a declaration concerning the relationship between cl 48A of the Construction Contract, and the SOP Act. As Edelman and Steward JJ explained in *Hobart International Airport Pty Ltd v Clarence City Council*,⁷¹ to accept that a controversy about the content of a contractual obligation owed by one party to another would be justiciable at the instance of one or other party, is to say nothing about whether it is, in a particular case, appropriate to make a declaration. Where jurisdiction exists, the making of a declaratory order is discretionary.⁷²

⁷¹ *Hobart International Airport Pty Ltd v Clarence City Council* (2022) 276 CLR 519 (*Hobart International*).

⁷² *Hobart International*, 555 [77] (Gageler and Gleeson JJ).

171 Central to the purpose of a judicial determination is that it 'includes a conclusive or final decision based on a concrete and established or agreed situation which aims to quell a controversy'.⁷³ Because the object of the judicial process is the final determination of the rights of the parties to an action, courts have traditionally refused to provide answers to hypothetical questions or to give advisory opinions.⁷⁴ As Ormiston JA said in *Ansett Australia Ground Staff Superannuation Fund Pty Ltd*,⁷⁵ 'from time to time... it has been held to be appropriate for courts to decide the legal consequences of certain events, when precisely defined, which either have not occurred or, more especially, when they may be affected by the occurrence of some future event. ... Usually, however, the Court's willingness to exercise the discretion to make such a declaration is predicated on the likelihood of the specific defined event occurring'.⁷⁶

172 The law's aversion to answering hypothetical questions is concerned with those questions which are divorced from the facts. If a party seeks a declaration which in effect does no more than to declare that the law dictates that a particular result will be obtained when certain facts are established, there will be no certainty that such a declaration will settle the dispute.⁷⁷ The fact that a declaration must engender finality exposes the principle that it must have utility. Consideration of whether a declaration will answer a 'real' question⁷⁸ requires a consideration of whether it will result in 'real' and 'foreseeable' consequences for the parties,⁷⁹ which are directed to resolving the dispute or an aspect of it on a final basis.⁸⁰ The efficient administration

⁷³ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 355 [45] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (*Bass v Permanent Trustee*).

⁷⁴ *Bass v Permanent Trustee*, 355-6 [47] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁷⁵ *Ansett Australia Ground Staff Superannuation Fund Pty Ltd v Ansett Australia Ltd and Others* (2003) 176 FLR 393 (*Ansett*).

⁷⁶ *Ansett*, 401 [15].

⁷⁷ *Bass v Permanent Trustee*, 356-7 [48]-[49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁷⁸ *Hobart International*, 538 [32] (Kiefel CJ, Keane and Gordon JJ).

⁷⁹ *Aussie Airlines Pty Ltd v Australian Airlines Ltd* (1996) 68 FCR 406, 414 (Lockart J, Spender J agreeing at 420, Cooper J agreeing at 420-1).

⁸⁰ *Dillon v RBS Group (Australia) Pty Ltd* (2017) 252 FCR 150, [26].

of the business of the courts is incompatible with answering hypothetical questions which frequently require time and expense which may be unnecessarily incurred.⁸¹

173 It is true, as Built says, that the declaration it seeks is concerned with the enforceability of a provision of the Construction Contract, and that Built and VCIP are presently in dispute concerning their respective obligations under that contract. It is also true that were cl 48A (or certain of its sub-clauses) declared void, the parties' dispute concerning the modular cells (broadly described) would likely be affected, at least because sub-cl 48A.4 would no longer operate to suspend the Linked Disputes described in the March 2025 NOD, until VCIP resolved its dispute with the State.

174 However, neither of those propositions undermines the conclusion that the declaration that Built seeks is not in fact concerned to resolve a real controversy that arises from concrete facts concerning the operation or application of the SOP Act and more particularly, the interaction between any particular provision of the SOP Act and cl 48A of the Construction Contract. Built seeks a declaration about those matters in order to affect, collaterally, the extant dispute between the parties which (as crystalised in the March 2025 NOD) does not concern progress payments, which is the fundamental concern of the SOP Act.

175 The purpose of the SOP Act is 'to provide for entitlements to progress payments for persons who carry out construction work or who supply related goods and services under construction contracts'.⁸² Its object is 'to ensure that any person who undertakes to carry out construction work or who undertakes to supply related goods and services under a construction contract is entitled to receive,⁸³ and is able to recover, progress payments by 'granting a statutory entitlement to that payment'.⁸⁴ The SOP Act exists to solve a problem, being that access to progress

⁸¹ *Bass v Permanent Trustee*, 357 [49] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

⁸² SOP Act, s 1.

⁸³ SOP Act, s 3(1).

⁸⁴ SOP Act, s 3(2).

payments was 'notoriously insecure' when the matter was left to parties.⁸⁵ Its legislative purpose is to prioritise a builder's entitlement to be put in funds for the full value of construction works.⁸⁶ The Act provides for entitlements to progress payments, as follows:

- (a) the builder under a construction contract is entitled to a statutory 'progress payment', on and from a reference date (s 9);
- (b) the amount of the statutory progress payment is either the amount calculated in accordance with the terms of the contract or the amount calculated on the basis of the value of the construction work carried out or the goods and services supplied (s 10);
- (c) Part 3 of the Act stipulates a procedure for obtaining the statutory progress payment amount: the builder serves on the principal a 'payment claim' which must identify the work to which the progress claim relates and the amount claimed (s 14);
- (d) the principal may reply to the claim by providing a payment schedule to the claimant which must indicate the amount of the payment (if any) that the principal proposes to make (s 15). The Act imposes consequences where payment is not made in accordance with a payment schedule (s 17);
- (e) the referral of any disputed claim to an adjudicator for determination. A claimant may apply for an adjudication of a payment claim under s 18.
- (f) the adjudicator is to make an 'adjudicator's determination' of the 'adjudicated amount' to be paid by the principal to the builder on a particular date at a particular interest rate (s 23);

⁸⁵ *SSC Plenty Road Pty Ltd v Construction Engineering (Aust) Pty Ltd* [2016] VSCA 119, [57] (*SSC Plenty Road*).

⁸⁶ *JG King Project Management Pty Ltd v Hunters Green Retirement Living Pty Ltd* (2024) 77 VR 406, 465 [241] (Kennedy JA) (*JG King Project Management*).

- (g) the principal must pay the adjudicated amount to the builder by the specified date (s 28M).
- (h) Part 3 of the SOP Act provides for the recovery of the progress payment in the event of a failure to pay.

176 'Where it can, the Act uses the terms of the construction contract as a point of reference for determining the timing and calculation of the statutory entitlement'.⁸⁷ For example, where the contract relevantly provides, the amount of a progress payment is to be calculated in accordance with the terms of the contract, and the entitlement is to be calculated by reference to a date which is determined by or in accordance with the contract.⁸⁸ The SOP Act does not limit any other entitlement a person may have under a construction contract, or any other remedy that a claimant may have for recovering that other entitlement.⁸⁹ If the amounts allowed under the Act are ultimately found to have exceeded the contractual entitlement a court must make allowance and, if necessary, order restitution.⁹⁰ Any liability arising under the Act is an interim payment on account.⁹¹ The regime established by the SOP Act has been described as, 'pay now, argue later'. As the Court of Appeal said in *SSC Plenty Road Pty Ltd v Construction Engineering Pty Ltd*, 'the "pay now" is a reference to the payment mandated by the Act. The "argue later" refers to disputes about contractual entitlements, including whether they should be affected by set offs etc'.⁹²

177 Turning to the Construction Contract, cl 48A limits VCIP's liability to Built in respect of Linked Claims, including by providing that its entitlement under a Linked Claim will be limited to the relief actually granted or paid to VCIP by an upstream party and as determined in accordance with any dispute resolution procedures between VCIP and the upstream party under the relevant upstream document.⁹³

⁸⁷ *JG King Project Management*, 413 [11] (Niall JA).

⁸⁸ SOP Act, s 10(1), s 9.

⁸⁹ SOP Act, s 3(4).

⁹⁰ SOP Act, s 47; *SSC Plenty Road*, [73].

⁹¹ *SSC Plenty Road*, [74].

⁹² *SSC Plenty Road*, [74].

⁹³ Construction Contract, sub-cl 48A.6

178 Although cl 48A is not explicitly concerned with progress claims, were it considered in isolation from its contractual context, it might be concluded that cl 48A (or parts of it) might or could restrict the operation of parts of the SOP Act which confer rights on Built to progress payments. I express the point this way because Built's application is not addressed to a particular part of the SOP Act that is said to be restricted or precluded. However, such a conclusion would require the making of two related assumptions: first, that a payment claim in issue or likely to be in issue is or would be a Linked Claim (as defined, and as that construct is applied in cl 48A) and second, that understood by reference to the whole of the contract, the parties intended that cl 48A would apply to claims for progress payments.

179 As discussed earlier, Built did not go so far as to say that any extant dispute concerning any Linked Claims and Linked Disputes described in the March 2025 NOD was a dispute about a payment for construction work. Rather, it was to be inferred that claims for payment arising out of present disputes would be Linked Claims. Built did not make that proposition good by reference to any particular claim of dispute. Nor did it go so far as to say that all payment claims must be Linked Claims because they arise out of the same or similar facts as claims or potential claims by VCIP against the State. Whilst at an abstract level that contention might be available on the face of the contractual text defining Linked Claims, its acceptance would require Built to grapple with the relationship between the provision made in the Construction Contract for payment claims, and cl 48A which is concerned with Linked Claims and Linked Disputes. A consideration of cl 48A in its contractual context raises the question whether it is intended to apply only to final as opposed to interim entitlements under the Construction Contract.

180 The question arises for reasons including that cl 42.1 of the Construction Contract provides explicitly for the making, assessment and payment of progress claims. Relevantly, cl 42.1 provides that within three business days of receipt of a payment schedule Built shall issue a tax invoice for the amount stated in the payment schedule and, subject to the provisions of the contract, within seven business days of

the receipt of the tax invoice, VCIP (or Built as the case may be) shall pay the amount certified.

181 Clause 53, which applies 'if the [SOP Act] applies' addresses the relationship between provisions of the SOP Act and various clauses of the Construction Contract, including cl 42.1. For example, cl 53.4 provides that the date prescribed by cl 42.1 as the time for payment claims is, for the purposes of the SOP Act, the 'reference date'.

182 The Head Contract contains substantially identical provisions for the making of payment claims by VCIP. Under cl 42.1 of the Construction Contract, the time between the making of a payment claim and the payment of a certified amount is 19 days. Under the Head Contract that period is 18 days. Accordingly, the provisions for progress payments under the Construction Contract and the Head Contract work together: if a payment claim is issued under the Construction Contract and the Head Contract on the same day, the payment claim under the Head Contract will be paid in accordance with that contract, one business day earlier.

183 Clause 42.1 of the Construction Contract provides that a payment made under cl 42.1 is a payment on account only; that such a payment shall not prejudice the right of either party to dispute under cl 47, whether the amount so paid is *properly due and payable*, and that on a determination of the amount so properly due and payable, the relevant party shall be liable to pay the difference between the amount of such payment and the amount so properly due and payable. Clause 47 of the Construction Contract provides for the resolution of disputes which include, by implication, the determination of any amount that VCIP is required to pay under the Contract.⁹⁴ The procedure under cl 47 is invoked by the delivery by one party of a notice of dispute, to the other. Clause 47.1 provides that 'if a notice of dispute is for a Linked Claim, Clause 48A shall apply'.

184 As is well understood, the meaning of particular words in a contract must be determined in light of the context provided by the contract as a whole and the

⁹⁴ See cl 47.1.

circumstances in which it was made.⁹⁵ The whole of the contract has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must, if possible, be construed so as to render them all harmonious with one another.⁹⁶ A court will strain against an interpretation that renders parts of a contract ineffective unless it is impossible to reconcile conflicting parts.⁹⁷

185 The parties' submissions in relation to the proper construction of cl 48A in relation to progress payments were confined. As noted, VCIP contended that payment claims, which are interim claims, were to be paid under the mechanism provided in cl 42.1, whereas cl 48A says nothing about the rights to progress payments conferred by the SOP Act. Built expressed its position very generally, and did not descend to address in any detail, the relationship between cls 42.1, 53, 47 and 48A, and their interaction with any provision of the SOP Act. In some respects the fact that the arguments unfolded that way is unsurprising, given that no payment claim was in issue. No party has invoked cl 48A in response to the service of a payment claim. These matters illustrate the difficulty with Built's application: the constructional issues that its proposed declaration raises should be resolved by reference to concrete facts concerning a real dispute, but the circumstances of this case do not permit such a determination.

186 The making of a declaration in this case, that cl 48A is void by operation of s 48 of the SOP Act, would have significant consequences for the parties' contractual relationship. It would not be a proper exercise of discretion to make a declaration in the circumstances, on a basis which is divorced from any factual dispute concerning the interaction between the statutory and contractual provisions.

187 Built's application for declaratory relief in respect of s 48 of the SOP Act is refused.

⁹⁵ *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 64 (Gibbs CJ).

⁹⁶ *Australian Broadcasting Commission v Australasian Performing Right Association Ltd* (1973) 129 CLR 99, 109.

⁹⁷ See for example, *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402, 411.

188 It follows that para (e) of Built's proposed declaration which concerns the application of cl 7 of the Construction Contract falls away in light of the conclusions otherwise reached.
