Keynote Speech by

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Supreme Court of Western Australia

Society of Construction Law Australia

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Between a Rock and a Hard Place

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KEYNOTE SPEECH BY THE HON. JUSTICE MICHAEL LUNDBERG
SUPREME COURT OF WESTERN AUSTRALIA

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Introduction

1. Good morning to all of you.

2. **First**, let me say how disappointed I am not to be able to join you in person at this wonderful and timely conference. I have only recently overcome my first ever bout of the coronavirus and have lost my proud status, which I had hoped to preserve for a few years yet, as an *immunicorn*.[1] Somehow, I managed to avoid the dreaded virus for the past three years of the pandemic, but have now arrived, fashionably late, to the COVID experience. I can now personally understand what the fuss was all about.

3. I must say I was very much looking forward to my first ever visit to Uluru, enjoying the balance of the conference and catching up with former colleagues from around the country. I have been to Alice Springs on a few occasions in my life, but a visit to the majesty of Uluru has escaped me thus far.

4. **Second**, and far more important than my COVID travails, let me also acknowledge that you meet on the land of the Anangu people and I pay my respects to the traditional owners of the land, and to their elders past and present. I speak today from my chambers at the Supreme Court in Western Australia, which is on the lands of the Whadjuk People of the Noongar Nation. I pay my respects to those traditional owners as well.

5. **Third** and finally by way of introduction, I wanted to thank the conference organisers for inviting me to speak at this conference. I am truly honoured to have been asked and once again regret I am unable to be there in person.

[1] Immunological unicorn.

Overview

6. With those words of introduction out of the way, let me briefly sketch out for you a summary of this address, which I hope will be reflective in a few respects of the chosen conference theme – *Between a Rock and a Hard Place*.

7. *First*, I propose to offer some observations about Sorry Day and National Reconciliation Week, as well as the discourse within which our country is presently in the midst as we head towards our first National Referendum in almost a quarter of a century. Given my role on the bench, it is neither appropriate nor my intention to offer any political views on these subjects. So forgive me if I tread carefully in this space.

8. *Second*, and perhaps of more immediate and direct relevance for the attendees at this conference and the constitutional aims of SOCLA, I also wanted to share with you how and why I came to become involved as a practitioner in construction and engineering litigation and arbitration. I must confess at this point that my practice over the 30 years before I was appointed to the bench was very much a generalist's practice. It would frankly be quite wrong of me to contend that I was ever a construction law specialist in the way that some of you in this room truly are.

9. So, with that description of the agenda out of the way, let me begin.

National Sorry Day and Reconciliation Week

10. Let me commence my substantive comments by recognising that today is National Sorry Day. As you will all appreciate, this day remembers and acknowledges the mistreatment of Aboriginal and Torres Strait Islander people who were forcibly removed from their families and communities. Those people are commonly known as *The Stolen Generations*.

11. The first Sorry Day was held in 1998. It was held one year after the *Bringing Them Home* report was prepared.[2] The primary authors of that report were the late Sir Ronald Wilson and Mick Dodson. Mick Dodson was then the Aboriginal and Torres Strait Islander Social Justice Commissioner. That report delved into the past policies leading

[2] *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, 1997 (the *Bringing Them Home Report*).

to Indigenous children being removed from their families and communities, all of which occurred within our living memory.

12. My mother, Dr Sue Gordon, was one of those children. She is a *Yamatji Ngoonoooro Wadjarri* woman. Her people - my people - are the *Wajarri Yamatji* people. That is a native title group which traverses a significant part of the mid-west of Western Australia.[3]

13. My mother was forcibly removed from her mother, my grandmother, at the age of four in 1947. In some ways, that feels like a long time ago. It was however a practice that continued well beyond 1947, which explains why the reference is correctly to the plural form - *Stolen Generations*, not *Stolen Generation*.

14. The location of my mother's removal was a small station not far from Meekatharra. *Meeka*, as we colloquially know it, is a dusty, gold rush town buried deep in the heart of Western Australia. Meeka has been the centre of gravity for most of my family on my mother's side for the last 100 years or more.

15. My mother turns 80 this year. She has lived a remarkable life despite being separated from her family for almost 30 years. She became the first indigenous person to head a Government Department in Western Australia, and the first Aboriginal Magistrate in the State. She was one of the inaugural commissioners of the body established in 1990 known as the Aboriginal and Torres Strait Islander Commission. She chaired the Northern Territory National Emergency Response Taskforce in 2007 and 2008. She received an Order of Australia in 1993 in recognition for her work with Aboriginal people and community affairs.

16. Despite my own personal achievements, and those of my older brother, we remain, very much, the underachievers of our family. So it goes.

17. My mother is presently drawing together the threads of her life for her autobiography, which has included an emotional return to the official correspondence which recorded her removal from her family. It is a strong demonstration of the attitudes of the time that the process of removal was openly and unashamedly documented in official

[3] https://www.ymac.org.au/ymac-representative-area-map/

communiques. This was not a process of subterfuge. It was not conducted in the shadows. It was conducted in plain sight.

18. Let me bring some context to these matters with a few passages from the correspondence of the day. I hope this assists to bring some perspective to the significance of today as our National Sorry Day.

19. The first passage is from a letter from an Inspector of Police to the Deputy Commissioner of Native Affairs sent in January 1946. The correspondence shows the police had been documenting their observations of my mother throughout 1946 and into 1947. They were exercising their duties under the Western Australian Aborigines Act of 1905.[4] Enforcing the policy of biological assimilation. The Inspector wrote:

> While carrying out an inspection of Belele Station on the 13th instant, I contacted a very light-coloured quadroon child named Susie aged two years, daughter of half caste woman Molly.
>
> I consider Susie is much too light in colour to remain at Belele and I recommend for your consideration that after the enquiries regarding Susie's father are completed, she be removed to Sister Kate's.

20. Later, in November 1946, a Police Constable in Meekatharra, who also held the rather ironic title of the Protector of Natives, took responsibility for the extraction of my mother. The Constable wrote to the Commissioner of Native Affairs and included the following passage:

> With regard to the child Susie, it is noted that her removal to Moore River is desired. It appears to me to be desirable that she be present at the Court proceedings and it is probable that this will be the most satisfactory time to affect the separation from the mother, *although the separation presents difficulties*.
>
> There does not appear to be any occasion for me to make further inquiries in this matter at Landor Station but it is noted that charges incurred in transporting Mollie and child to Meekatharra will be met by your Department.

21. The Constable's phrasing is harsh and unpleasant. *Although the separation presents difficulties*. As it happens, the Station Manager wrote a compelling letter on my

[4] See the *Aborigines Act 1905* (WA). By its long title, it was *'An Act to make provision for the better protection and care of the Aboriginal inhabitants of Western Australia'*. This Act governed the lives of Aboriginal people in Western Australia for around 60 years. This statute created the position known as the *'Chief Protector of Aborigines'* who became the legal guardian of every Aboriginal child to the age of 16 years. The Act was repealed by the *Native Welfare Act 1963* (WA).

mother's behalf to prevent her removal. However, his letter failed to move the authorities. The Deputy Commissioner of Native Affairs responded:

> First, the child Susie is a quadroon, and not a half-caste, and therefore in view of her near-white status she is definitely entitled to a chance to be reared as a white person away from native associations...
>
> I fully realise that Molly is not likely to part with Susie easily, and she is going to *suffer the pangs which all mothers must experience upon separation from a child*, but this department has a definite duty to carry out in an attempt to ensure the future of all near-white children.

22. And so it was that in November 1947 my mother was removed. She was driven in a car by the Constable from the pastoral station to Meekatharra. At night. A journey of some three to four hours. She was taken to the local Magistrate's Court the next day. Then handed to a strange lady who took my mother on the midnight train from Meekatharra to Perth. A four year old Aboriginal kid from the bush.

23. She was then brought up as an orphan and a ward of the State at an orphanage in Perth known as Sister Kate's.[5] Some 30 years later, in 1976, my mother and my grandmother were reunited. I was five at the time.

24. This short factual recitation of the events which occurred involving my mother in 1947 was repeated on many occasions, across Australia. It is in this context, and because of these events, that then Prime Minister, the Honourable Dr Kevin Rudd AC expressed an apology to the Federal Parliament in February 2008. That apology included these words:

> Today we honour the Indigenous peoples of this land, the oldest continuing cultures in human history.
>
> We reflect on their past mistreatment.
>
> We reflect in particular on the mistreatment of those who were Stolen Generations - this blemished chapter in our national history.
>
> The time has now come for the nation to turn a new page; a new page in Australia's history by righting the wrongs of the past and so moving forward with confidence to the future.

[5] The role of the Sister Kate's Home is discussed in Chapter 7 of the *Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families*, Human Rights and Equal Opportunity Commission, 1997 (the *Bringing Them Home Report*).

> We apologise for the laws and policies of successive Parliaments and governments, that have inflicted profound grief, suffering and loss on these our fellow Australians.
>
> We apologise especially for the removal of Aboriginal and Torres Strait Islander children from their families, their communities and their country.
>
> For the pain, suffering, and hurt of these Stolen Generations, their descendants and for their families left behind, we say sorry.
>
> To the mothers and the fathers, the brothers and the sisters, for the breaking up of families and communities, we say sorry.
>
> And for the indignity and degradation thus inflicted on a proud people and a proud culture, we say sorry.[6]

25. The Prime Minister spoke of a new page in the history of Australia being written. That new page has since included the *2017 Uluru Statement from the Heart*. A powerful statement addressed to the Australian people, calling for a constitutionally enshrined Voice and the establishment of a Makarrata Commission to supervise agreement-making and truth-telling. There are some brief parts of that Statement I wish to recite, if I may:

> This sovereignty is a spiritual notion: the ancestral tie between the land, or 'mother nature', and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors.
>
> This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown.
>
> How could it be otherwise? That peoples possessed a land for sixty millennia and this sacred link disappears from world history in merely the last two hundred years?
>
> With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia's nationhood.[7]

26. National Sorry Day and Reconciliation Week, which begins tomorrow, represent important parts of the healing process for Aboriginal people and this country. And this year, of all years, those events in the calendar take on special significance as they fall

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[6] Hansard, House of Representatives, Apology to Australia's Indigenous Peoples, the Hon. Kevin Rudd, 13 February 2008, pg 167.

[7] See the full statement at www.ulurustatement.org and at https://www.referendumcouncil.org.au/final-report.html#toc-anchor-ulurustatement-from-the-heart.

against the backdrop of *The Voice Referendum*. At some point later this year, all of us will have our say in that referendum about whether to change the Constitution to recognise the First Peoples of Australia by establishing an Aboriginal and Torres Strait Islander Voice.

27. As I have mentioned, I do not propose to offer any opinion on the competing views which surround *The Voice Referendum*. I appreciate views differ about the likely impact and the utility of the body that is sought to be established. The positive aspect of the Referendum process (and an issue on which I can appropriately comment) is that it is sparking greater debate about how our country has treated Aboriginal people since settlement and the current plight of First Nations people. The debate seems to me to be a timely vehicle to teach Australians about the history of Indigenous people and the push for recognition over the past several decades. By this I mean that the debate creates a process to inform people about matters which not all Australians were taught nor which have been the subject of informed general public discourse. Lawyers and professionals may be familiar with this history but I do not believe the balance of the community gets the chance to reflect on these matters very often, if at all.

28. So the opportunity before us is an important one.

29. Whatever the outcome, the debate concerning *The Voice Referendum* gives us an opportunity to educate. To teach the broader community beyond the obvious points of history. To understand that if there is a section of our society who are truly caught between a rock and a hard place, it is the First Nations people of Australia.

30. As you will appreciate from what I have just recounted, National Sorry Day is a significant date on the calendar for my family. Today has significance for my family from another perspective as well. It is my birthday today. I turn 52. The fact my birthday falls on a day also marked as "*Sorry Day*" is a fact my older brother regards as more than mere coincidence and, indeed, highly appropriate. Those of you with older siblings will recognise that their humour can be quite hurtful. But enough about older siblings and my birthday. Let me return to matters of greater significance.

31. I invite you all to reflect, during this conference, on the importance of Sorry Day and of the week of reconciliation which lies ahead.

32. Many, if not most of you, within your law firms and professional organisations, already undertake great work in supporting the path of reconciliation. Most professional organisations have a structured Reconciliation Action Plan and undertake *pro bono* work which involves giving time and energy to Indigenous causes. Some firms take active steps to recruit and to promote Indigenous professionals. These are all worthy endeavours and provide tremendous support to First Nations people.

33. I simply invite you to reflect, while you are at this location, at this spiritual place, *at this Rock*, on the future pathway of reconciliation. As the then Federal Opposition Leader said in response to the Prime Minister's apology in 2008:

> We will be at our best today and every day if we pause to place ourselves in the shoes of others, imbued with the imaginative capacity to see this issue through their eyes with decency and respect.[8]

Construction disputes – some personal reflections

34. Let me now change pace a little. Let me turn from matters of reconciliation reflection to some personal reflections on my experience in the world of construction and engineering disputes.

35. Let me start by explaining why I became attracted to large scale construction litigation and arbitration disputes.

36. As a commercial litigation partner, I certainly received a jolt of enthusiasm when a client called to deliver fresh instructions on an infrastructure project or a mining contract or a building dispute. That initial feeling that you were about to digest a new set of facts; that blank page on which you could map out a strategy for the client; that initial meeting with your team to tell them about the exciting work ahead; that call or email to your preferred engineering, delay or quantum experts to put your foot on them and ensure you have the right team to embrace the challenge and deliver results. There is much to love about all of that. I can tell you, having been a Judge for only a little over six months, I still miss that adrenalin rush and the team-based nature of big litigation and arbitration in this space.

[8] Hansard, House of Representatives, *Apology to Australia's Indigenous Peoples*, Mr Brendan Nelson, 13 February 2008, pg 173 (a speech which attracted criticism for other reasons, but not for this particular passage).

Engineering complexities

37. What is it about such disputes that gave me this positive feeling? It is, I venture, the physicality of the disputes - the engineering complexities. Having recently left private practice, I had occasion to reflect on some of the disputes on which I acted over the years and why I relished the experience.

38. The first major dispute involving a large mining project which sticks in my mind was an iron ore project in South Africa. The arbitration dispute arising of the project was a domestic arbitration conducted before three retired Supreme Court Judges in Perth. The parties also agreed that those arbitrators would conduct the mediation. It was my first experience with a Med-Arb process.[9] This was 20 years ago. Having come from a non-arbitration background before joining Mallesons, I found the Med-Arb process somewhat unusual. I still do, although I recognise there are international jurisdictions where this process is more common.

39. The reason I mention this dispute is not the presence of the Med-Arb process. I recall this dispute because I asked that the client get me on a plane to South Africa, together with my team including senior counsel, to proof the witnesses and see the lie of the land. I am glad I did. Spending 10 days in Pretoria gave me a better understanding of my client and their perspective.

40. The next major construction and engineering dispute I worked on was for the Leighton Kumagai Joint Venture. The JV had a dispute with the State Government in WA. The Joint Venture was contracted to construct the underground rail stations and twin rail tunnels which now run under the Perth CBD. Many of you will appreciate the engineering complexities which arise when tunnels are to be constructed under a major city. Incidences of tunnels imploding during construction, around the world, have produced catastrophic consequences in terms of loss of life, loss of property, and insurance disputes that can run for years.

[9] Being a mediation arbitration process, which involves the same person acting as both a mediator in seeking to facilitate a settlement between the parties, and also as an arbitrator to determine the issues in dispute and issue a final and binding award. By way of background, see the paper issued by the Law Council of Australia: *Med-Arb Commentary, A Guide for Legal and ADR Practitioners,* Law Council of Australia, October 2022.

41. I was one of a team of four litigation partners at Mallesons who worked on that matter. I was the most junior partner. The first step I took on the matter, together with another Mallesons partner who was a construction specialist, was to ask to see the Tunnel Boring Machine (**TBM**) in action. I am very glad I did. We were in the happy position that the tunnelling activity was still under way when we were engaged to act on the matter. The TBM was only part way on its journey along (or should I say under) William Street in Perth. William Street is one of the main connecting streets in central Perth.

42. To see a TBM in action, gouging through solid earth and simultaneously creating a concrete structure behind it as it proceeds, is a thing of beauty. To learn, as I did, that the TBM would be buried on the site after its useful capacity had been exhausted (as is often the case)[10] is to understand the human experience. That may be something of an overstatement, I accept. But let me say that seeing a TBM in full flight certainly provided me with a greater interest in large scale engineering disputes.

43. I thereafter made it a practice in my litigation career to visit the site of the project giving rise to the dispute, whenever that was possible. At a client relationship level, there is much to be gained from venturing to the site of the dispute, to be with the client in its natural habitat, as it were. And as a litigator, surely there are few better ways to gain an authentic understanding and impression of the issues that give rise to the dispute. As to the manner in which the site, the natural elements, and the people on the project, all coalesce. It provides benefits in the process of preparing for cross-examination of lay and expert witness. I say it is an essential step, where possible.

44. Some years later, like many at this conference I suspect, I took an engagement to act on disputes associated with the Roy Hill iron ore project in Western Australia.[11] My role concerned the port facility site at Port Hedland. My first step was to insist on a site visit to see the enormity of the project. My fellow partners and I agreed we would tell the client we wanted to travel to the site at our own cost and without incurring any fees

[10] https://www.pta.wa.gov.au/news/media-statements/tunnel-boring-machine-begins-digging-under-perth-city.
[11] By way of general background, in respect of one of the downstream disputes, see the decisions of the Supreme Court of Western Australia in *Ralmana Pty Ltd v BGC Contracting Pty Ltd* [2016] WASC 131 (Kenneth Martin J); and *Ralmana Pty Ltd v BGC Contracting Pty Ltd [No 2]* [2017] WASC 373 (Kenneth Martin J).

for the time spent. The client naturally agreed to that. I suspect the client would have paid regardless, but moments like that can cement long-lasting client relationships.

45. As I mentioned, the Roy Hill port project is located in Port Hedland. That town is located in the heart of the Pilbara region in Western Australia. As it happens, I was born in Hedland and grew up in the shadows of the vast BHP iron ore stockpiles that dominated the landscape of the town during my childhood (and still dominate that landscape today). Stackers, reclaimers, iron ore processing plants, massively long rail lines, the longest trains in the world, and deep water harbours. Those were the physical structures which I spent my first 17 years living amongst. Port Hedland is of course not just a BHP town anymore. It is the home of many mining companies.

46. Seeing the Roy Hill site up close was a rewarding experience. What is that reward, you ask? The reward, at least in my view, is to understand the way in which a mining project works, to understand the interaction between subcontractors in the construction process, to see up close how the delays on site have or could unfold, and to appreciate, in the case of the Roy Hill site, the significance of the geotechnical and ground issues at play. As some of you may know, many of the newer sites in Port Hedland are built on reclaimed marsh and swamp land. Ground improvement and geotechnical design issues are always likely to arise in disputes on such projects.

Scale

47. I should also say that disputes involving large projects typically allow you the space and opportunity to explore the issues that need to be explored. By that I mean such matters allow you to chase every rabbit down every hole, if the client agrees. Of course, there are sometimes only rabbits down a few of those holes. The point to be made though is that one does not feel intellectually short changed in handling such matters.

48. Large scale construction and engineering disputes often arise from projects which are truly of significance to the State or even the national economy. These projects can move the dial on a political level. I found working on such matters as a litigator gave me an additional sense of the profoundness of what we do, and how it can impact people and impact entities beyond the parties to the litigation.

49. So, all of this represents part of my positive relationship with construction litigation and engineering disputes. I have an additional small confession to explain (or perhaps demonstrate) my attachment to engineering disputes. My confession is that, on at least two family holidays, I have structured journeys to ensure that I can see large scale civil infrastructure projects.

50. When in France some years ago, I insisted that our family take a 200 km detour to drive over the *Millau Bridge* in the south of the country.[12] That is the tallest bridge in the world. A spectacular feat of engineering.

51. In Sweden some years later, I structured a holiday to ensure we drove over the *Øresund Bridge* which connects Denmark and Sweden. We were journeying to the Swedish University town of *Lund*, from which my father's family name derives. The *Øresund Bridge* is the longest combined road and railway structure in Europe. For those with a Nordic noir crime bent, the *Øresund Brid*ge featured in the television show *The Bridge* some years ago. That television show begins with a body being found, apparently cut in half at the waist, in the middle of the bridge, placed precisely on the border between the two countries.[13] The ensuing (fictional) investigation thus fell under the jurisdiction of both the Danish and Swedish police agencies. My wife and I were devoted fans of the TV show.

52. I regret to say I did not get the opportunity in practice to handle an engineering dispute which also involved a body cut in half, straddling two jurisdictions. However, if any of you take instructions on such a dispute, I would be pleased to hear about it.

53. But I digress. I suspect I will need to accept that my fascination with these feats of modern engineering may well be classified as some mild form of behavioural illness. Some of you at this conference may share this diagnosis.

54. Some of you might now be wondering, in light of what I have just shared, does this man have any feelings of dissatisfaction towards construction and engineering disputes? I do. I will mention some areas where improvement or reflection may be called for.

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[12] https://www.ice.org.uk/what-is-civil-engineering/what-do-civil-engineers-do/millau-viaduct
[13] https://en.wikipedia.org/wiki/The_Bridge_(2011_TV_series)

Greater efficiency in pleadings and evidence

55. The first area I wish to mention arises from the practice, which I know many fall into, of disregarding the pillars of pleading and admissibility rules in assembling our cases, particularly in the arbitral sphere. Let me briefly comment on this point and my experiences.

56. I should start by recognising that, admittedly, the flexibility of pleading and evidence reception in the world of arbitration has benefits and marks out that territory in contrast to the strict rules applicable in court-based disputes. That flexibility has advantages. The parties to an arbitral dispute are of course free to agree on the procedures to be followed by the arbitral tribunal in conducting their proceedings.

57. My dissatisfaction arises from the time that is lost, and the cost which is incurred, when the drafting of memorials, witness statements and expert reports in modern arbitration matters are not approached in a way which focuses on the core or key issues truly in dispute between the parties. Too often they are drafted as narratives which become impenetrable, detailing every item of correspondence, including quotes from correspondence, without forensic judgment.

58. I am not suggesting that the discipline of pleading and admissibility rules must be slavishly applied in an arbitration context. Rather, it is to remember that those rules are in part designed to ensure that the materials produced by the parties are prepared in a focused manner, which allows the trier of fact, whether Judge or Arbitrator, to understand the true issues in dispute.

59. I am not the only person to make this observation. Others with far greater experience in such matters have offered similar comments. Professor Doug Jones AO, in a paper delivered in 2022, made the following comments:

> More recent practice suggests that, in their current form, [witness statements] might not be [indispensable]. Witness statements have been transmogrified from a short and curt recitation of a factual witness' memory of the events the subject of an arbitration, into a vehicle for the making of legal submissions, commenting on documents (even documents the witness had never seen before the arbitral proceedings commenced) and speculating on all manner of things, including the conduct of other parties.

> In order to promote arbitral efficiency, reduce costs, and enable the tribunal and parties to focus on the real issues in dispute, this trend needs to be addressed. Witness statements should return to something closer to their original purpose, namely giving the tribunal an account of what the particular witness heard, saw or thought at the time of the events the subject of the arbitration. In this effort, international arbitration practitioners have something to learn from commercial litigation…[14]

60. Where pleadings are employed in an arbitral context, I would suggest that similar observations apply. The danger is that the force of a parties' case becomes lost in the volume of irrelevant material. Speaking as a relatively newly-minted Judge, this is an experience which now resonates with me, with far greater force than when in practice.

61. As a Judge, I am eager to address the core issues in dispute between the litigants so I can resolve their dispute in a timely way. The focussed preparation of evidentiary material and pleadings can only serve to further this objective. This objective is shared by both Arbitrators and Judges alike, in my view.

Dispute resolution clauses

62. Allied to this, my other sense of dissatisfaction in practice in this space was my inability as a litigator, arriving late to the scene of the crime as it were, to change the already agreed dispute resolution clause in the parties' agreement.

63. Often times, commercial litigators are faced with a clause agreed years or decades before, such as on a long-life oil & gas project. The dispute resolution clause may have been given limited thought, perhaps in the final stages of drafting. Perhaps no thought at all. Naturally, it will have been agreed when the parties were in their honeymoon phase. *We'll never argue about this project*, they might say! Of course, when the shooting starts years later and the litigators arrive, the parties' insistence on a arbitration clause with limitations on the ability to pursue full disclosure from the counterparty, may prove a source of regret.

64. I certainly had clients on construction disputes over the years who, but for the strictures of the DR clause, would dearly have loved to pursue full documentary disclosure from the counterparty, to be able to more readily pursue subpoenas (which is a problematic

[14] *Memorials and witness statements: The need for reform* presented by Professor Doug Jones AO and Robert Turnbull, 2022 (https://dougjones.info/content/uploads/2021/12/DJ-and-RT-Memorials-and-Witness-Statements.pdf).

process in international arbitration disputes), and to ensure the cross-examination of witnesses was conducted in the public spotlight, rather than in a private, closed-door arbitration.

65. The ideal situation for a litigator in this space, which I am confident I encountered a few times in my career, was to be presented with a DR clause in the governing instrument which had been the subject of thoughtful drafting by a front-end construction specialist. While the perfect DR clause has yet to be invented, careful drafting of a clause by an experienced specialist, with the benefit of detailed client instructions, and ideally not having been prepared at a minute to midnight, can save much heartache, and not just for the litigators.

SOPA Adjudications

66. The final aspect of dissatisfaction in this space that I should confess is the running of Security of Payment Adjudications.[15] There is no time today for me to offer my more fulsome observations on these curious beasts under the SOPA regimes which operate across the country. But I would be less than truthful if I suggested to you that I miss SOPA adjudications now that I have joined the bench.

67. I am more than happy to visit them, now from time to time, as part of a judicial review application or an enforcement application, for which the Supreme Court has jurisdiction. However, I shall not miss running them as a litigation partner. I suspect there are those in this room who have lost days of their lives, assembling the swathes of material which are needed, in order to comply with the tight timetables which apply on SOPA Adjudications.

68. I am referring of course to the large value disputes which utilise the SOPA process. The SOPA process is a good fit for small or medium value claims.

[15] In Western Australia, see the *Construction Contracts Act 2004* (WA) in respect of contracts entered into prior to 1 August 2022. Thereafter, in Western Australia, see the *Building and Construction Industry (Security of Payment) Act 2021* (WA). In other jurisdictions, I refer to the *Building and Construction Industry Security of Payment Act 1999* (NSW); the *Building Industry Fairness (Security of Payment) Act* 2017 (Qld); the *Building and Construction Industry Security of Payment Act 2002* (Vic); the *Building and Construction Industry Security of Payment Act 2009* (SA); the *Building and Construction Industry (Security of Payment) Act 2009* (ACT); the *Construction Contracts (Security of Payments) Act 2004* (NT); and the *Building and Construction Industry Security of Payment Act 2009* (Tas).

69. However, where the amounts sought are high value and involve great complexity, requiring lawyers to produce a ridiculous number of lever arch files of materials, within a matter of days, seeking millions of dollars in interim payments, or opposing such payment – the SOPA Adjudication scheme seemed to me to be something of an ill-fitting process. The use of the SOPA regime in such instances may be regarded as something of a hijacking of the original intention and purposes of that regime.

Conclusion

70. Let me finish this speech by reiterating that I thoroughly enjoyed the construction and engineering disputes I ran for clients over the last 20 or more years. I found disputes in that space to be challenging and intellectually rewarding.

71. I recognise I am preaching to the converted today in offering that comment, which is perhaps why I have also felt it appropriate to mention some areas in which the disputes process in this space may warrant closer examination or improvement.

72. That leaves me only to thank you all for your time this morning and to thank SOCLA for inviting me to speak. Let me wish all of you a thoughtful and reflective conference.

Hon. Justice Michael Lundberg
Supreme Court of Western Australia
26 May 2023