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Disputes Arising from Government-Funded Infrastructure Projects: Application to India of the Australian State and Commonwealth Experience

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DISPUTES ARISING FROM GOVERNMENT-FUNDED INFRASTRUCTURE PROJECTS: APPLICATION TO INDIA OF THE AUSTRALIAN STATE AND COMMONWEALTH EXPERIENCE

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INTRODUCTION

There is a tendency to either deny the existence of the problem, procrastinate over it, pass the file over to another authority, or dismiss the problem as altogether unsolvable.[4]

Disputes are an inevitable consequence of large, complex construction projects, particularly infrastructure projects. Attempts may be made at the outset to mitigate the likelihood of disputes, such as through innovative procuring and contracting strategies. Attempts may be made to reform legal procedures to enable disputes to pass swiftly and cheaply through arbitral tribunals and courts. These are well-known ways of improving the efficiency of project delivery, although they can be difficult to implement in practice.

But there is an intervening step between the commencement of a project and its resolution via arbitration and litigation: namely, the decision to escalate disputes to arbitration and litigation, rather than settling them. Doubtless, there are valid reasons why government might invoke an arbitration clause, or seek to have an award set aside in a court. However, when the approach of government has inspired the criticism extracted in the epigraph above, there is serious reason to question why so many disputes are not being resolved at the early stages, and are instead leading to protracted arbitrations and litigations.

This paper asks that question, and places it in the broader context of India's strategies for infrastructure procurement. The argument of this paper is that there is an urgent need for reform, and that that reform must be a coordinated response to the various factors that lead to the problem in the first place. Australia is offered as an example of where a similar problem has been all but eradicated.

This paper is divided into four Parts:

1) **Part I: Overview** provides an overview of the landscape of infrastructure procurement in India, and its most conspicuous challenges.

2) **Part II: The Problem – Ineffective Dispute Resolution** seeks to diagnose with precision what exactly the problem is that faces Indian infrastructure procurement. It highlights issues at the organisational level of domestic arbitration in India, the national level of India's procurement guidelines, and finally at the level of individuals involved in the procurement process.

3) **Part III: The Australian Experience** introduces Australia as a case study of where a similar problem has been resolved through a number of innovations in government and the legal profession, noting in particular changes in contracting strategies, the role of national auditing institutions, government policies, and the success of dispute avoidance boards.

4) **Part IV: Potential for Reform** discusses potential solutions to the problem as it manifests itself in India, bearing in mind principles to be taken from the Australian experience and noting also recent efforts at reform in India. No attempt will be made formally to prescribe specific reforms. Rather, the approach will be to contrast and seek to reconcile the Indian and Australian approaches as established in the preceding Parts.

It is hoped that this paper might not only provide a clear distillation of the problem of inefficient dispute resolution and its impact on project delivery in India, but also spur interest in resolving this problem with a view to lessons learnt overseas in Australia.

[4] Sneha P et al, 'Bureaucratic Indecision and Risk Aversion in India' (2021) 2(6) *Indian Public Policy Review* 55, 57.

PART I: OVERVIEW

Infrastructure expenditure has been increasing for some time now in India. The country's construction industry is second in size only to the agriculture industry.[5] From 2005, major projects for urban revival were commenced via the Jawaharlal Nehru National Urban Renewal Mission (JNNURM),[6] which estimated that local governments (Urban Local Bodies) would require ₹1.2 trillion over the ensuing seven years,[7] of which the Union Government committed ₹660 billion.[8] That project gave way to multiple subsequent initiatives, including the Clean India Campaign, Atal Mission for Rejuvenation and Urban Transformation (AMRUT), Housing for All by 2022 and Smart Cities Mission.[9] As of 2020, India has been embarking on the National Infrastructure Pipeline (NIP), a nationwide government initiative designed to facilitate the rapid expansion of the country's infrastructural resources. 9488 projects have been committed under the NIP, with a total project cost of US$1.9 trillion.[10]

India has had, for some time now, a claim to the world's largest PPP programme.[11] This programme has been well-supported by government initiatives and bodies, including the Committee on Infrastructure (chaired by the Prime Minister), the Public-Private Partnerships Appraisal Committee (PPPAC), the Viability Gap Fund[12] and India Infrastructure Finance Company Limited (IIFCL),[13] the PPP Appraisal Committee and, more recently, the adoption of standard contracts and model concession agreements.[14]

The present explosion in infrastructure investment followed a realisation of the extent of the infrastructure deficit in respect of India's rapidly increasing population.[15] Concerns had been raised that the development of India's infrastructure was not commensurate with the increasing demand for

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[5] Amit Moza & Virendra Kumar Paul, 'Analysis of Claims in Public Works Construction Contracts in India' (2018) 23(2) *Journal of Construction in Developing Countries* 7, 7.

[6] Isher Judge Ahluwalia, 'Urban Governance in India' (2019) 41(1) *Journal of Urban Affairs* 83, 95–6.

[7] See Ministry of Urban Employment and Poverty Alleviation and Ministry of Urban Development, *Jawaharlal Nehru National Urban Renewal Mission: Overview* (Government of India, 2005) (available at https://mohua.gov.in/upload/uploadfiles/files/1Mission%20Overview%20English(1).pdf).

[8] Ahluwalia (2019) (n 6) 96.

[9] Ibid 95–7; Kumar V Pratap & Rajesh Chakrabarti, *Public-Private Partnerships in Infrastructure: Managing the Challenges* (Springer, 2017) 244–50.

[10] See Ministry of Commerce and Industry (Government of India), 'National Infrastructure Pipeline', *India Investment Grid* <https://indiainvestmentgrid.gov.in/national-infrastructure-pipeline> (accessed 4 December 2023).

[11] Augustine Edobor Arimoro, *Public Private Partnerships in Emerging Economies* (Routledge, 2020) 103, 108–9. In 2006, India recorded over 500 PPP projects totalling ₹340 billion. See Pratap & Chakrabarti (2017) (n 9), placing India's PPP market just behind Brazil and China in investment and number of projects respectively: at 220.

[12] See especially Pratap & Chakrabarti (2017) (n 9), noting that 324 projects, with total investment value of ₹2.5 trillion, had been cleared and received a commitment from the VGF of ₹0.5 trillion: at 228.

[13] See Pratap & Chakrabarti (2017) (n 9), noting that by late 2016, the IIFCL had committed ₹404 billion for 229 projects: at 228. The scheme was restructured in 2022 as part of an increasing prioritisation of infrastructural development: Infrastructure Finance Secretariat, Department of Economic Affairs, Ministry of Finance (Government of India), *Scheme for Financial Support for Project Development Expenses of PPP Projects: 'IIPDF Scheme' (India Infrastructure Project Development Fund Scheme)* (18 November 2022) 1 [1.4], 2 [1.10].

[14] Arimoro (2020) (n 11) 104–5; Pratap & Chakrabarti (2017) (n 9) 228–31.

[15] The urban infrastructure investment deficit was estimated to be US$827 billion (valued in 2009–2010) for 2012–31: Ahluwalia (2019) (n 6) 91, citing High Powered Expert Committee, *Report on Urban Infrastructure and Services* (National Institute of Urban Affairs, 24 February 2011). See also Peter N Varghese AO, *An India Economic Strategy to 2035: Navigating from Potential to Delivery* (Report to the Australian Government, 2018) 211–13 (available at https://www.dfat.gov.au/sites/default/files/minisite/static/07db88b0-d450-4887-9c90-31163d206162/ies/pdf/dfat-an-india-economic-strategy-to-2035.pdf).

infrastructure generated by the size of the population:[16] for example, the 100,000km that comprise the National Highways network contribute only 2% to the overall road network but carry 40% of traffic; and of those highways, over 75% are only one- or two-lane (total) highways.[17] This also follows a period in the 2010s in which, while the tax disbursements to the State governments increased, the overall contribution of the Union Government to infrastructure projects proportionately decreased.[18]

It is difficult to overstate the significance of effective and efficient infrastructure delivery for the economic and social development of any country.[19] The benefits may be direct (increased investment, production of labour and other markets) and indirect (through the use of said infrastructure once delivered).[20] While public sector procurement comprises 15% of the worldwide GDP, it may comprise up to 70% of the GDP of countries still undergoing economic development.[21] This significance has, of course, been recognised and expressed by the Indian procurement authorities.[22]

The viability of this pipeline is, however, under threat. The delivery of infrastructure projects in India has been plagued by cost and time overruns. It has been estimated that infrastructure projects in India on average suffer from time and cost overruns in the order of 20–25% of original estimates, which figure may be as much as 50% in certain cases.[23] A loss in GDP of US$80 billion has been ascribed to the inefficient execution of infrastructure projects, with US$50 billion attributable to time and cost overruns.[24] In 1987, 186 out of 290 major projects (of value ₹200 million or more) were suffering cost overruns, and 162 had time overruns; with total cost overrun of 50% and total time overrun of 43%.[25] Of a survey of 566 major projects in September 2012, 46% were shown to have suffered delays to their completion date.[26] The total cost of stalled projects may amount to ₹18 trillion.[27] This trend appears to show no sign of slowing.[28]

Of course, this issue is the product of innumerable factors.[29] 'Procurement capacity', a measure of the ability of a government effectively to deliver infrastructure projects, comprises the totality of factors that range from the level of the overarching national context (a nation's human and natural resources) to an organisational level (the structure of government entities) and finally to an individual

[16] Moza & Paul (2018) (n 5) 7; Varghese (2018) (n 15) 211; Department of Economic Affairs, Ministry of Finance, *Scheme and Guidelines for India Infrastructure Project Development Fund* (Government of India, 2007) iii.
[17] See Pratap & Chakrabarti (2017) (n 9), discussing also congestion in air and sea travel: at 220–1.
[18] Ahluwalia (2019) (n 6) 98.
[19] See, eg, Moza & Paul (2018) (n 5) 7; Patrick Manu et al, 'Contribution of Procurement Capacity of Public Agencies to Attainment of Procurement Objectives in Infrastructure Procurement' (2021) 28(10) *Engineering, Construction and Architectural Management* 3322, 3323. See also Varghese (2018) (n 15) 211; Sebastian Morris, 'Cost and Time Overruns in Public Sector Projects' (1990) 25(47) *Economic and Political Weekly* 154, 154; Rahul Nath Choudhury & Pravin Jadhav, 'Introduction' in Pravin Jadhav & Rahul Nath Choudhury (eds), *Infrastructure Planning and Management in India: Opportunities and Challenges* (Springer, 2022) ix–x.
[20] Manu et al (2021) (n 19) 3324.
[21] Ibid 3323. See also Richard Ohene Asiedu & Ebenezer Abaku, 'Cost Overruns of Public Sector Construction Projects: A Developing Country Perspective' (2020) 13(1) *International Journal of Managing Projects in Business* 66, 66.
[22] See, eg, Arimoro (2020) (n 11) 103.
[23] Moza & Paul (2018) (n 5) 7.
[24] Ibid.
[25] Morris (1990) (n 19) 154–5. Morris, however, emphasises that the problem runs far deeper than any numerical assessment can reveal: at 155.
[26] Pratap & Chakrabarti (2017) (n 9) 221.
[27] Ibid 242.
[28] For a discussion of the trends regarding cost overruns over time more broadly, see Abderisak Adam, Per-Erik Bertil Josephson and Göran Lindahl, 'Aggregation of Factors Causing Cost Overruns and Time Delays in Large Public Construction Projects' (2017) 24(3) *Engineering, Construction and Architectural Management* 393, 397.
[29] See ibid 399, 401; Leah Musenero, Bassam Baroudi & Indra Gunawan, 'Critical Issues Affecting Dispute Resolution Practice in Infrastructure Public-Private Partnerships' (2023) 149(3) *Journal of Construction Engineering and Management* 040230011: 2.

level (experience of personnel).[30] Delays in land acquisition have often been cited as particularly problematic:[31] the NHAI has in past awarded contracts in respect of land, only 30% of which had already been acquired.[32] Other issues include issues in the allocation of resources as between various infrastructure sectors;[33] a process for obtaining clearances under environmental regulations that is inefficient and open to corruption;[34] and the risk of disputes arising from third parties, such as groups of the public impacted by the development.[35] These issues affect different projects in different sectors and in different parts of the country to varying degrees. For example, the urban environment has been described as particularly afflicted by infrastructure delays and inefficiencies in public procurement policy and government structures, such as the allocation of resources between State and local governments.[36]

This paper focuses on one important issue which contributes to the overall problem: namely, that of inefficient dispute resolution mechanisms. The position in respect of infrastructure delivery on projects in which the government has an interest, either directly as a contracting party, or through a state-owned enterprise, is that it is exceptional for contentious issues which arise during the project to be resolved either at the project level or, indeed, at a senior executive level. The intent of the next Part will be to examine how this phenomenon came about and why it persists throughout the Indian infrastructure landscape.

[30] Manu et al (2021) (n 19) 3325. See similarly Asiedu & Abaku (2020) (n 21) 69–70; Francisco Pinheiro Catalão, Carlos Oliveira Cruz and Joaquim Miranda Sarmento, 'Public Sector Corruption and Accountability in Cost Deviations and Overruns of Public Projects' (2023) 23 *Public Organization Review* 1105, 1106.
[31] Arimoro (2020) (n 11) 105–6; Ahluwalia (2019) (n 6) 92–3. Cf Pratap & Chakrabarti (2017) (n 9), arguing that delays in land acquisition cause 15–20% of project delays and may therefore be the largest contributor to overall project delays: at 230, 239.
[32] Pratap & Chakrabarti (2017) (n 9) 239.
[33] See Morris (1990) (n 19) 156–7.
[34] Ahluwalia (2019) (n 6) 93.
[35] See Musenero, Baroudi & Gunawan (2023) (n 29), discussing the Gwalior Bypass project in India: at 9.
[36] See Ahluwalia (2019) (n 6) 84–5.

PART II: THE PROBLEM – INEFFECTIVE DISPUTE RESOLUTION

Effective dispute resolution serves both public interests and those of private contractors or investors, in that it allows attention, financial and otherwise, to remain focused on the project at hand and not be diverted to the management of disputes. However, the current trends in the context of Indian infrastructure projects reveal a lack of effective dispute resolution contributing to this objective.

Infrastructure dispute resolution in India involves committing to arbitrators, and then to the courts, decisions on disputed matters, even where the project contract involves a dispute board. There has developed an almost automatic five-tier scale of resolution: 'guileless' negotiations between party representatives; mediation; reference to an expert panel or dispute board; arbitration; and litigation.[37] Notably, where there are dispute boards and decisions are made contrary to the government or the government entity, there seems to be a process of instant reference to arbitration of the issue resolved against the government by the dispute board;[38] after which applications to set aside or refuse enforcement of the arbitral award inevitably ensue and are pursued even to the Supreme Court.[39] Often, these applications serve merely to provide the relevant government authority with a certificate of dismissal as an assurance that the dispute could not have been taken further.[40] As it was put by the Department of Economic Affairs in a letter to the Ministry of Railways on 2 August 2021,[41] 'litigation in High Courts should be an exception' and not a rule.[42]

The promise of arbitration, like other forms of ADR, being quicker and cheaper than litigation simply is not being, and cannot be, fulfilled in such circumstances.[43] Consider by way of example the proceedings in *Misra & Co v Damodar Valley Corporation*:[44] although the arbitral proceedings (ie, what took place between the appointment of the arbitrator and the issuance of the award) were completed in less than one year, the award was only rendered enforceable by the Court almost three years thereafter, and its enforcement was still being litigated in the Supreme Court almost three decades after the original award.[45] Arbitration to which is necessarily added such a prolonged process of litigation does not serve

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[37] See Musenero, Baroudi & Gunawan (2023) (n 29) 2, citing Mark Moseley, 'Restoring Confidence in Public-Private Partnerships: Reforming Risk Allocation and Creating More Collaborative PPPs' (2020) 41 *Governance Brief* 1.

[38] See Musenero, Baroudi & Gunawan (2023) (n 29) 2, citing PHJ Chapman, 'Dispute Boards on Major Infrastructure Projects' (2009) 162 *Management, Procurement and Law: Proceedings of the Institution of Civil Engineers* 7.

[39] See Manu Thadikkaran, 'Judicial Intervention in International Commercial Arbitration: Implications and Recent Developments from the Indian Perspective' (2012) 29(6) *Journal of International Arbitration* 681, 684.

[40] The Supreme Court has termed these 'certificate cases': *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (2021) 11 SCC 357, 377 [53] (Kaul J for the Court).

[41] Department of Economic Affairs, Letter No 13/23/2020-PPP (2 August 2021).

[42] See Ministry of Railways (Railway Board), Letter No 2021/Infra/21/2 (16 August 2021). See also *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40), in which Kaul J, delivering the judgment of the Court, noted that '[i]t is, thus, left to this Court as usual to give the final knockout punch, being the fifth round of the adjudicatory process on this issue itself!': at 366 [17].

[43] Recourse to arbitration as a means of avoiding litigation being regarded originally as a positive policy manoeuvre: Law Commission of India, *One Hundred Twenty Sixth Report on Government and Public Sector Undertaking Litigation Policy and Strategies* (Report No 126, 1988) 36 [6.1]; *Fuerst Day Lawson Ltd v Jindal Exports Ltd* (2001) 6 SCC 356. See also Vijay K Bhatia, 'International Commercial Arbitration in Asia: Discursive and Professional Perspectives' in Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (Routledge, 2018) 7, 8. For a discussion of a similar situation in the context of Indian solvency law, see Akshaya Kamalnath & Aparajita Kaul, 'Adding Mediation to India's Corporate Resolution Process' (2022) 31 *International Insolvency Review* 163, 167.

[44] (2018) 11 SCC 269.

[45] *Misra & Co v Damodar Valley Corporation* (2018) 11 SCC 269, 272 [8] (Bhushan J for the Court). Nor was the Supreme Court able finally to dispose of the appeal, ordering the public sector company instead to adopt a conciliatory attitude and arrive at a settlement: at 274 [14] (Bhushan J for the Court).

the object of being cheap and expedient, and, it is submitted, strays unacceptably far from the root purpose of ADR.[46]

Of the time and cost overruns that have brought a US$50 billion hit to India's GDP, 'many … are a result of disputes at some stage of the process'.[47] In June 2017, the National Highways Authority of India (NHAI) was involved in 144 matters before the courts, and a further 132 before arbitral tribunals (up from 112 in April 2015),[48] with a total claim amount against it of approximately ₹4.37 billion.[49] In the context of defence procurements, difficulties in enforcing and correcting non-compliance with contracts, and the disputes that have been caused from this, have arguably been the largest contributor to delays and overrun costs.[50]

This is to be understood within a context of massive pendency of judicial cases in India, which transforms what is 'only' a dysfunctionality in standard ADR processes that frustrate a project into a serious issue that jeopardises the plan for infrastructural development in its entirety.[51] In December 2021, there were 69,855 cases pending before the Supreme Court; 5.6 million cases pending before the High Courts; and 40.5 million cases pending before the District and Subordinate Courts.[52] As of July 2023, these figures have increased to 69,766; 6.06 million; and 44.1 million respectively.[53] What is particularly notable for this paper is that Indian governments or government entities are themselves by far the most represented litigants in Indian courts,[54] with it being estimated that approximately 46% of pending cases involve the Indian or state governments or government entities.[55] At least as regards the Supreme Court, this disproportionately impacts regular hearing cases, which become subject to delays brought on by the deluge of admission hearings.[56]

This is by no means a new observation or a recent problem.[57] Indeed, the issue of frivolous litigation on the part of government and public sector undertakings was the subject of a Law Commission of India report in 1988,[58] in which it was said that:

> *Government and public sector undertakings must have their own litigation policy and strategies and they must be devised with a view to encouraging avoidance of litigation and settlement of disputes by alternative methods … Public sector undertakings and the government have to*

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[46] See Musenero, Baroudi & Gunawan (2023) (n 29) 2; Patrizia Anesa, 'Arbitration Practice in India: A Discursive Perspective' in Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (Routledge, 2018) 54, 60. See also Arthad Kurlekar & Gauri Pillai, 'To Be or Not to Be: The Oscillating Support of Indian Courts to Arbitration Awards Challenged under the Public Policy Exception' (2016) 32 *Arbitration International* 179, describing the 'Sisyphean process of litigation': at 194.

[47] Moza & Paul (2018) (n 5) 7.

[48] Shri Pon Radhakrishnan (Minister of Road Transport and Highways), Answer to Question No 6097, Lok Sabha, 30 April 2015 (available at https://eparlib.nic.in/bitstream/123456789/660944/1/15486.pdf).

[49] National Highways Authority of India (NHAI), Policy Circular No 2.1.23/2017 (2 June 2017) [1].

[50] Oishee Kundu, 'Risks in Defence Procurement: India in the 21st Century' (2021) 32(3) *Defence and Peace Economics* 343, 354.

[51] See generally Tushar Kumar Biswas, *Introduction to Arbitration in India: The Role of the Judiciary* (Wolters Kluwer, 2013) 141 [9.01].

[52] See Department-Related Parliamentary Standing Committee on Personnel, Public Grievances, Law and Justice, *One Hundred Seventeenth Report on The Mediation Bill, 2021* (Report No 117, Rajya Sabha, Parliament of India, 13 July 2022) 1 [1.0] ('*117th Report on The Mediation Bill 2021*').

[53] 'More Than 5 Crore Cases Pending in Courts in India', *Times of India*, 22 July 2023 (available at https://timesofindia.indiatimes.com/india/more-than-5-crore-cases-pending-in-courts-in-india/articleshow/102042623.cms?from=mdr).

[54] Law Commission of India (1988) (n 43) 12 [2.11], 42 [8.15].

[55] See *117th Report on The Mediation Bill 2021* (2022) (n 52) 13 [3.11].

[56] Madhav Khosla & Ananth Padmanabhan, 'The Supreme Court' in Devesh Kapur, Pratap Bhanu Mehta & Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford, 2017) 104, 122.

[57] Biswas (2013) (n 51) 141 [9.01].

[58] Law Commission of India (1988) (n 43).

> *conserve the resources, determine priorities of expenditure by a judicious approach so that unproductive litigation does not eat away a large chunk of the scarce resources, [smothering] socially beneficial schemes for want of financial assistance.*[59]

The issue well predates this report.[60] Note the following comments by Krishna Iyer J in the High Court of Kerala in 1972:

> *The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy [should be implemented] of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf.*[61]

This problem has been well-noted by the Supreme Court.[62] As recently as August 2023, the Chief Justice and Justices of the Supreme Court, in dismissing petitions for special leave to appeal to the Court, commented on the undue reversion to frivolous litigation and appeals by the government,[63] with the Chief Justice notably commenting on the 'dysfunction' that frivolous litigation brings to the court and advising the government to 'please stop filing such petitions'.[64] The Attorney-General has cautioned that the relentless stream of frivolous appeals that are pursued to the Supreme Court risks the 'conversion of [the] Supreme Court into a small causes court'.[65] The Court has noted also, albeit in a different context, the difficulty of balancing parties' constitutional rights to carry on business and resolve their disputes with legislation that is designed to structure parties' extra-curial dispute resolution processes by imposing time limits.[66] The delays that extreme pendency of cases brings also impinges on the constitutional rights of parties regarding access to justice.[67]

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[59] Law Commission of India (1988) (n 43) 7 [1.9].

[60] Note also the 54th Report of the Law Commission of India on 'the mind-set of the Government agencies/undertakings in filing unnecessary appeals', which was delivered in 1973 and discussed in *Punjab State Power Corporation Ltd v Atma Singh Grewal* (2014) 13 SCC 666, 670 [8] (Radhakrishnan and Sikri JJ).

[61] *PP Abubacker v Union of India*, AIR 1972 Ker 103 (Kerala High Court), 107 (Krishna Iyer J), quoted in *Dilbagh Rai Jarry v Union of India* (1974) 3 SCC 554, 562 [25] (Krishna Iyer J), cited with approval in *Urban Improvement Trust, Bikaner v Mohan Lal* (2010) 1 SCC 512, 515 [7] (Raveendran J for the Court).

[62] Lamenting the quantity of cases brought by the government or public sector entities: *Dilbagh Rai Jarry v Union of India* (n 61) 561 [25] (Krishna Iyer J); *State of Punjab v Geeta Iron & Brass Works* (1978) 1 SCC 68, 69 [4] (Krishna Iyer J for the Court); *Urban Improvement Trust, Bikaner v Mohan Lal* (n 61) 514 [5] (Raveendran J for the Court); *Misra & Co v Damodar Valley Corporation* (n 45) 270 [2] (Bhushan J for the Court); *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 377 [50] (Kaul J for the Court). Lamenting in particular the trivial nature of such cases: *Gurgaon Gramin Brank v Khazani* (2012) 8 SCC 781, 782 [2], 784 [11]–[12] (Radhakrishnan J for the Court); *Punjab State Power Corporation Ltd v Atma Singh Grewal* (n 60) 669–70 [6]–[7] (Radhakrishnan and Sikri JJ).

[63] See *Bharat Sanchar Nigam Ltd v The Rites Ltd*, Supreme Court of India, Special Leave Petition (Civil) Diary No 23145/2023, 4 August 2023 (Chandrachud CJ, Pardiwala and Misra JJ); *Union of India v Kishori Lal*, Supreme Court of India, Special Leave Petition (Civil) Diary No 38070/2022, 11 August 2023 (Gavai, Narasimha and Mishra JJ).

[64] See Utkarsh Anand, 'Don't Make Judiciary Dysfunctional by Sheer Volume of Cases: SC to Govt', *The Hindustan Times* (4 August 2023) (available at https://www.hindustantimes.com/india-news/supreme-court-dismisses-bsnl-s-petition-criticizes-government-for-excessive-litigation-101691163062294.html).

[65] R Venkarataramani (Attorney-General for India), *Address at the Constitution Day Celebrations*, 26 November 2022.

[66] See *Committee of Creditors of Essar Steel India Ltd v Satish Kumar Gupta* (2020) 8 SCC 531, [127], discussed in Kamalnath & Kaul (2022) (n 43) 167.

[67] See *Kadra Pahadiya v State of Bihar*, AIR 1982 SC 1167; *Hussainara Khatoon v Home Secretary (Bihar)* (1980) 1 SCC 8, discussing Constitution of India, art 21. See further Biswas (2013) (n 51) 141–2 [9.01].

This gives rise to a sclerotic process of dispute resolution which hampers the efficiency of infrastructure delivery in India. Among the consequences of this unsatisfactory process are:

a) Contractors, including in their bids, making allowances (or adding premiums) for the risk (perhaps certainty) that there will be a slow process of resolution of any claims they may make for additional payment which are not able to be certified at the project level, thus producing a higher cost of infrastructure delivery. This phenomenon is itself both a cause and consequence of this cyclical and self-perpetuating problem: see below.

b) Very significant additional costs associated with arbitration and court proceedings, the court proceedings being attempts, almost as a matter of course, to set aside arbitral awards which decide issues against the government or the government interests.[68] The Department of Legal Affairs advised that the total expenditure incurred on conducting cases on behalf of the Union Government before Indian courts was ₹543,549,015 in 2022–23, with the total expenses incurred since 2018 being over ₹2.72 billion.[69] While it is true that, of amounts claimed by contractors in the first instance, usually only a portion is awarded once the dispute runs its course, the added costs that this process necessitates seriously undermine whatever benefits the pursuit of the dispute might be thought to have gained.[70] The absurdity of one such example was the subject of the scrutiny of the Supreme Court in dismissing a Special Leave Petition in respect of a claim for only ₹15,000, when that dispute had been ongoing for 10 years and had cost the government entity substantially more than that in legal fees.[71]

c) The expenditure of significant administrative and other resources by government and contractors to handle the dispute process, rather than devote their attention to the effective delivery of projects, and the planning and execution of other projects.[72] This is only more pronounced in respect of intra-governmental disputes, which prompted Kaul J of the Supreme Court to begin the judgment of the Court by exclaiming:

> *Which pocket of the Government should be enriched has taken forty-four (44) years to decide — a classic case of what ought not to be!*[73]

The bottom line is that the present situation effectively undermines at least part of the economic value to India of the infrastructure development being undertaken.

However, it is not enough simply to state this problem, as though it owes its existence to ignorance or a failure to appreciate that there is, in fact, a serious problem. As noted above, the problem of judicial pendency is well known both to the courts and to scholarly commentators, and as will be discussed below, specific efforts have already been made in resolving this problem. That the problem should be so recursive in such circumstances is, in itself, one of its more remarkable and pernicious aspects — if the consequences are so obviously detrimental, why has it not been resolved, as a matter of priority? On the other hand, it has been observed that inefficiencies in dispute resolution processes that derive from ineffective oversight and monitoring of issues by public sector entities naturally

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[68] See, eg, NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) [1].

[69] Shri Arjun Ram Meghwal (Minister for Law and Justice, Minister for Parliament Affairs and Minister for Culture), Answer to Question No 252, Lok Sabha, 21 July 2023, Annexure B (available from https://legalaffairs.gov.in/sites/default/files/AU252.pdf).

[70] Moza & Paul (2018) (n 5) 14.

[71] *Gurgaon Gramin Brank v Khazani* (n 62) 783–4 [8]–[10], 785 [14] (Radhakrishnan J for the Court)

[72] See Law Commission of India (1988) (n 43) 18–19 [2.27], 29 [5.1]; *Punjab State Power Corporation Ltd v Atma Singh Grewal* (n 60) 673 [13] (Radhakrishnan and Sikri JJ)

[73] *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 362 [1] (Kaul J for the Court). See also at 376 [49] (Kaul J for the Court).

perpetuate themselves — if no-one is there to observe the inefficiencies and seek to prevent them from recurring, will the same mistakes not be repeated in the next dispute?[74]

Certainly, an increase in resources and attention being committed to the management of infrastructure projects would be a welcome and, indeed, necessary change, should the current infrastructure pipeline remain viable. However, this reflects only a portion of the problem. This paper argues that the extent of the contribution that this issue has to the prevailing issue has not yet been appreciated or fully analysed in legal scholarship, and that a complete understanding has yet to have been described as to why this issue should occur.[75]

This is because the phenomenon of inefficient dispute resolution is itself undoubtedly the result of multiple contributing factors.[76] To borrow the taxonomy cited above,[77] while limiting factors may operate at the organisational level (the approach of courts and tribunals to arbitration and other dispute resolution mechanisms), they often also exert their influence from the broader, national level (India's procurement frameworks and their interaction with the constitution and the law) to the individual level (the factors influencing the decisions made by individuals).[78] An attempt fully to grasp the issue at hand must traverse all these spheres and come to a conclusion as to their respective contributions to this issue.[79]

A. The Organisational Level – The Institution of Arbitration

While it is short-sighted not to consider the broader context in evaluating the (in)effectiveness of ADR mechanisms in keeping infrastructure projects on track, it would be reductive to ignore the issues with these ADR mechanisms themselves. In particular, arbitration is not achieving its purpose of diverting matters from the courts by providing parties with the swift and final resolution of their disputes.[80] Delays to the process have, unfortunately, become commonplace in arbitrations in India.[81] The delays that inefficient arbitral procedure can bring can be serious. For example, the Government of India attributed three years' worth of delays to arbitral procedure in the context of the Nathpa Jhakri Hydro-Electric Project.[82] Problems with India's adoption of international arbitral procedural norms bear some of the responsibility.[83]

The most commonly cited problem with arbitral process in India and certain other countries concerns the intervention of the courts in applications to set aside or refuse enforcement of arbitral

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[74] See Musenero, Baroudi & Gunawan (2023) (n 29) 8, citing Denise Currie & Paul Teague, 'Conflict Management in Public-Private Partnerships: The Case of the London Underground' (2015) 31(3) *Negotiation Journal* 237.
[75] For similar such acknowledgements and attempts at a more holistic explanation, see Musenero, Baroudi & Gunawan (2023) (n 29) 1; Asiedu & Abaku (2020) (n 21) 67. See also Morris (1990) (n 19), noting the difficulty of making quantitative attributions of wasted costs to any particular problem: at 154.
[76] See further Law Commission of India (1988) (n 43), issuing a similar prefatory caution: at 38 [7.1].
[77] In **Part I: Overview**, itself borrowed from Manu et al (2021) (n 19) 3325.
[78] See also the eleven-factor approach in Musenero, Baroudi & Gunawan (2023) (n 29) 6–10.
[79] See similarly Manu et al (2021) (n 19) 3327–8.
[80] See also Anesa (2018) (n 46) 55. On the 'paradox' of judicial intervention in arbitration, see Ashwin Shanbhag & Amoga Krishnan, '*NAFED v Alimenta*: Has India Missed the Wood for the Trees?' (2020) 16(2) *Asian International Arbitration Journal* 233, 233–4.
[81] See generally Krishna Sarma, Momota Oinam & Angshuman Kaushik, *Development and Practice of Arbitration in India: Has It Evolved as an Effective Legal Institution* (Working Paper No 103, Center on Democracy, Development and the Rule of Law, Stanford University, October 2009) 14–15 (available at https://cddrl.fsi.stanford.edu/publications/development_and_practice_of_arbitration_in_india_has_it_evolved_as_an_effective_legal_institution).
[82] Musenero, Baroudi & Gunawan (2023) (n 29) 2.
[83] A proposition with which Indian respondents to a 2018 survey agreed: Anesa (2018) (n 46) 57.

awards through the 'public policy' exception.[84] As this term is not defined in the UNCITRAL Model Law on International Arbitration from which it derives, and has not been defined in the *Arbitration and Conciliation Act 1996* (India), it has been a matter for the courts to give 'public policy' a wide or a narrow interpretation. The consequence is that certain decisions of the Supreme Court, most notably that of *Oil and Natural Gas Corporation Ltd v Saw Pipes Ltd*,[85] were sufficient to open the floodgates of court intervention, by providing for a wide interpretation of 'public policy' exceptions.[86]

While precedents established in respect of domestic arbitrations had also been applied in the context of international arbitrations,[87] the Supreme Court subsequently remedied the position by imposing or, rather, construing a legislative limit on the 'public policy' exception in respect of international arbitrations.[88] Beneficial as this has been for the international perception of India's arbitration 'friendliness',[89] the law applicable to domestic arbitrations has stagnated and been unable to move past this hurdle.[90] Arguably, these inefficiencies in procedure in domestic arbitrations in India have led it to be largely disregarded by Indian companies, who often make recourse instead to international institutional support.[91]

As long as this avenue to set aside or refuse enforcement of awards remains so widely available, parties (including the government) will continue to view it as a viable means of escalating concluded arbitrations to litigation in the courts — precisely the problem on which this paper focuses.

The issue of judicial intervention, while most prominent at the post-award stage, is also noteworthy during the arbitration proper, in which judicial intervention is considerably more common in India than in other jurisdictions.[92] This is in direct contradiction not only to a key principle of international arbitration, but also of the adoption of the *Arbitration and Conciliation Act 1996* (India) in particular.[93] Other elements of the management and culture of arbitration in India also contribute to delays, including a lack of interest among advocates, a lack of diversity among arbitrators, and the absence of clear procedural pathways from commencement to award.[94]

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[84] A full discussion of the law pertaining to the 'public policy' exception is beyond the scope of this paper. For detailed discussions that contemplate also the Indian context, see, eg: John K Arthur, 'Setting Aside or Non-Enforcement of Arbitral Awards in International Arbitration on the Public Policy Ground: A Regional Perspective' in Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (Routledge, 2018) 21; Rizul Jai, 'Critical Evaluation of Arbitration in India' in Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (Routledge, 2018) 133, 137–40; Biswas (2013) (n 51) 102–18; Anirudh Hariani, 'Indian Arbitration and the Shifting Sands of Public Policy' (2020) 16(2) *Asian International Arbitration Journal* 159; Kurlekar & Pillai (2016) (n 46).

[85] (2003) 5 SCC 705.

[86] The 'public policy' exception was extended in its application to contemplate any violation in an arbitral award of a statute of India, which essentially permitted the Court to reappraise the substantive law and its application in a wide array of arbitral awards: see Bhatia (2018) (n 43) 13; Biswas (2013) (n 51) 110 [7.03]; Hariani (n 84) 177.

[87] Hariani (n 84) 177–8.

[88] Bhatia (2018) (n 43) 13.

[89] See, eg, Kurlekar & Pillai (2016) (n 46) 180. Cf Shanbhag & Krishnan (n 80), suggesting that the door to unwanted judicial intervention may have been reopened: at 240–2.

[90] For a further discussion of the distinction between the courts' treatment of public policy in domestic and international arbitrations, see *Shri Lal Mahal Ltd v Progetto Grano SpA* (2014) 2 SCC 433, [22], [25] (Lodha J). See further Bhatia (2018) (n 43) 17–18.

[91] See Bhatia (2018) (n 43) 9; Anesa (2018) (n 46) 55–6; Hariani (n 84) 188.

[92] See Khosla & Padmanabhan (2017) (n 56), commenting on judicial intervention in the appointment of arbitrators: at 123.

[93] See especially the curial statements in *Food Corporation of India v Indian Council of Arbitration* (2003) 6 SCC 544.

[94] On which Professor Doug Jones AO spoke most recently on 26 August 2023 at a conference hosted by the Delhi Young Arbitration Lawyers' Forum, the Indian International & Domestic Arbitration Centre (IIDAC), and Manipal Law School, Bangalore, entitled 'Arbitration in India: Past, Present & Future'.

This is not to say that the adoption in India of practices that conform with international arbitral experience has been, or will continue to be, a universal good. For instance, the trend internationally has been to prioritise party autonomy in arbitral procedure. Beneficial as this may generally be, it has led to a relaxing of time limits that were formerly imposed on parties and arbitrators under the *Arbitration Act 1940* (India), thereby favouring party autonomy regarding procedure over the public interest in insisting upon the speedy resolution of disputes by arbitration.[95] The subsequent insertion of a time limit in the amendment to the 1996 Act has not been effective.[96] A similar issue concerns the delays brought on by overlong evidentiary hearings,[97] a problem also faced by the courts.[98]

A separate, but related, point concerns the increasing frequency of appeals to the Supreme Court. While such appeals (as granted under Article 136 of the Constitution) were initially designed to be granted only in cases of exceptional legal importance, the Court has itself been expanding the scope of Article 136;[99] such that the number of appeals to the Supreme Court has been increasing exponentially, whereas the number of disputes being disposed of in the subordinate courts has been limping behind.[100]

However, it is not the point simply to note that arbitrations in India often run over time or are otherwise inefficient: that would obfuscate a proper appreciation of the *antecedent* question (ie, why such disputes inevitably arise in respect of such projects) and the *succedent* question (ie, why there is a constant escalation of disputes to arbitration, and from arbitration to litigation).[101] Accordingly, this paper turns now from the dispute resolution mechanisms themselves to the context, at the national and individual level, that surrounds it. There arise two questions: first, why do so many serious disputes and magnitudinous claims arise in these projects in the first instance (**Section B: The National Level** below); and secondly, why do so many such disputes continue unimpeded to arbitration, litigation and appeal (**Section C: The Individual Level** below)?

B. The National Level – India's Procurement Framework

First, although disputes are, to some extent, an inevitable consequence of complex infrastructure projects and rapidly changing times, do any factors peculiar to India account for the frequency of serious disputes in Indian infrastructure procurements?

A prefatory point to note is the distinction between a 'claim' under a contract and a 'dispute' that arises out of it. To some extent, both are inevitable. However, it is, broadly speaking, the escalation of the former to the latter that is the locus of the issues with which this paper deals.[102] This escalation may be seen as brought about by a triad of factors: the contract, the triggering event, and the conflict that arises as between the parties.[103] Of these factors, it is the contract that can arguably exert the greatest

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[95] See Anesa (2018) (n 46) 58–9.
[96] See Shri Kiren Rijiju (Minister of Law and Justice), Answer to Question No 2755, Lok Sabha, 4 August 2021 (available at https://legalaffairs.gov.in/sites/default/files/USQ%202755%20for%204%20Aug%202021.pdf).
[97] Anesa (2018) (n 46) 63.
[98] See Khosla & Padmanabhan (2017) (n 56) 123.
[99] See ibid, noting that the Court recently declined the opportunity to implement formal guidelines restricting the Article 136 discretion: at 124.
[100] See ibid, noting also that these trends only encourage litigants to continue to pursue this vexatious behaviour: at 115–16, 121.
[101] The former half of this point was made by Musenero, Baroudi & Gunawan (2023) (n 29) 1.
[102] The former may be said to take place 'within' the contract, and may therefore be anticipated and controlled through the terms of the contract; whereas the latter essentially fractures the relationship brought on by the contract. On this taxonomy between 'claim' and 'dispute', see further Moza & Paul (2018) (n 5) 8. See similarly Pratap & Chakrabarti (2017) (n 9) 261; Asiedu & Abaku (2020) (n 21) 75–6.
[103] See SO Cheung and TW Yiu, 'Are Construction Disputes Inevitable?' (2006) 53(3) *IEEE Transactions on Engineering Management* 456, 457, cited in Moza & Paul (2018) (n 5) 9.

influence on the severity of the dispute, and that can most feasibly be amended to safeguard against such wasteful disputes.[104]

Robust and effective policy frameworks have the potential to resolve many issues at the 'front-end' before they should even arise.[105] Such policies have been cited as a major contributing factor to the success of certain PPP projects (which are, however, nonetheless not immune from the problems identified above).[106] On the other hand, poor contract management and inadequate attention to the early stages of the process have variously been described as the most significant contributing factor to delays in the procurement of infrastructure, causative of significantly greater risk than shortages in cash or raw materials.[107]

The most conspicuous problem with the early stages of procurement contracts concerns the tender process itself, in which lowest-price tendering remains the most prevalent practice. Unrealistic budgets being agreed at first instance can have serious and irremediable consequences on the viability of seeing the project through to its end and on attaining value for money.[108] Nor is it clear that this approach is conducive of greater competition. Narrowly focusing on single factors, such as price, or prescribing certain technological and design specifications, rather than formulating them in collaboration with the contractor, is an unsustainable strategy, and has led to serious issues in certain waste management works in India, including the progression of disputes to litigation.[109] It is only natural that the government entity will exert final control over the terms of the procurement arrangement; however, when that control is too one-sided and admits of no consideration for the contractors' views, claims on the part of the contractor against the government entity becomes increasingly inevitable.[110]

Ensuring the quality of the final product is not a separate concern to ensuring efficiency and timeliness of delivery.[111] When works do not meet the required quality, disputes (and their associated costs and delays) naturally follow, such as the arbitration in respect of the Delhi Airport Metro Express which led to the termination of that PPP arrangement.[112] The costs of rework, which are seldom front-of-mind for contractors,[113] nonetheless can contribute significantly to the overall cost of the works.[114] As implementing quality control (unlike, for example, safety regulation) is typically seen as an issue for the contractor, despite having obvious ramifications for the public for whom the infrastructure is

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[104] Moza & Paul (2018) (n 5) 9–10.
[105] Arimoro (2020) (n 11) 115. Kundu (2021) (n 50) 354; Adam, Josephson & Lindahl (2017) (n 28) 401.
[106] Arimoro (2020) (n 11) 109.
[107] Manu et al (2021) (n 19) 3335–6; Morris (1990) (n 19) 159 (Table 5). See also Kundu (2021) (n 50) 354; Adam, Josephson & Lindahl (2017) (n 28) 401.
[108] Manu et al (2021) (n 19) 3337; Asiedu & Abaku (2020) (n 21) 76.
[109] Tharun Dolla & Boeing Laishram, 'Competition in Infrastructure Procurement: Analysis of Waste Management Sector of India' (2022) 103(2) *Journal of the Institution of Engineers (India): Series A* 375, 382.
[110] Moza & Paul (2018) (n 5) 14, 18.
[111] Alongside time and cost, it forms part of the 'iron triangle' of key performance criteria for construction projects: cf Roger Atkinson, 'Project Management: Cost, Time and Quality, Two Best Guesses and a Phenomenon, Its Time to Accept Other Success Criteria' (1999) 17(6) *International Journal of Project Management* 337, 337–8, discussed in Asiedu & Abaku (2020) (n 21) 66–7. See also Manu et al (2021) (n 19) 3337; Pratap & Chakrabarti (2017) (n 9) 221. On the lack of a 'quality culture' in infrastructure delivery, see Peter ED Love et al, 'Curbing Poor-Quality in Large-Scale Transport Infrastructure Projects' (2022) 69(6) *IEEE Transactions on Engineering Management* 3171, 3178.
[112] Love et al (2022) (n 111) 3174–5.
[113] It has been argued that a shift of attention in contractors from ensuring quality to simply meeting minimum safety requirements is responsible, although, ironically, there is a higher incidence of accidents and safety regulation violations in respect of reworks: ibid 3172.
[114] The increase in cost that rework brings to large transport works is, on average, as much as 12%: Love et al (2022) (n 111) 3172, citing Ying Li and Timothy RB Taylor, 'Modelling the Impact of Design Rework on Transportation Infrastructure Construction Project Performance' (2014) 140(9) *Journal of Construction Engineering and Management* 04014044. See also Adam, Josephson & Lindahl (2017) (n 28) 400.

being developed, it has largely been neglected as a concern in procurement policies and regulations.[115] The adoption more recently of Quality-cum-Cost Based Selection (QCBS) for public procurement is naturally a welcome change, although 'cost' still remains by far the most important factor by which projects are mentioned: accounting for 70% of the selection criteria generally, and 100% of the selection criteria in respect of projects, such as major infrastructure projects, that exceed ₹100 million.[116]

As discussed above, a consequence of the delay and cost overruns that have become endemic in infrastructure projects is that contractors are making allowances for this in (and adding significant premiums to) their bids; or rather, bids are being made with unrealistically low cost estimates (with a view to being selected in the lowest-cost tender model), which estimates are then raised, leading to inevitable disputes.[117] This phenomenon has been observed particularly in the context of large, 'bundled' PPP concession agreements, for which the complexity and multi-faceted nature of the arrangement introduces many areas of difficulty and, potentially, avenues for exploitation.[118] Renegotiation of contracts is not, in itself, problematic. As will be emphasised below, the willingness to hear and consider the interests and concerns of the contractor, and to be adaptable, is an essential aspect of maintaining the viability of projects.[119] However, the prevalence of this phenomenon, and the fact that renegotiations often occur so soon after the contract is awarded,[120] suggests that there are other motivations. It is made problematic by the fact that it essentially bypasses the competition sought to be generated by a system of open tendering (with the 'true' price being determined in the uncompetitive space of bilateral negotiations between the opportunistic, underbidding contractor and the government entity), and by the fact that the government contrarily seems less willing to prioritise public interests than to give way to private ones.[121]

This problem is self-perpetuating, as insofar as government entities continue to focus attention on the price of the initial tender but subsequently allow that price to increase in renegotiations, the private sector will continue to view this as a viable strategy: awarding a contract in this way to the contractor who is the best negotiator, rather than the one that is best placed to ensure delivery of the project, is a 'perverse outcome'.[122] Generally speaking, the goal of the contract may be described as that of managing the uncertainties inherent in complex projects.[123] Where foundational parts of the contract, such as price or timelines, remain variable and are not fixed in a candid and reasonable manner, with detailed provisions for their variation in appropriate circumstances, it is impossible proactively to manage these uncertainties.[124] The incidence of disputes is, therefore, inevitable.

One need not presume aggressive opportunism on the part of the contractor: a lack of communication in these early stages of the project may simply cause parties to misconstrue or

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[115] Love et al (2022) (n 111) 3171.

[116] See Ministry of Finance, Department of Expenditure, *General Instructions on Procurement and Project Management* (Government of India, 29 October 2021).

[117] See Asiedu & Abaku (2020) (n 21) 68. This phenomenon is occasionally referred to as the 'Jugaad' principle of opportunism: Pratap & Chakrabarti (2017) (n 9) 262–3. Quite apart from what the Sanskrit and Proto-Indo-European roots of 'Jugaad' imply ('agreement, connection, union'), this approach tends rather to lead to fractured relationships and adversarial disputes.

[118] Tharun Dolla & Boeing Laishram, 'Governance Issues in PPP Procurement Options Analysis of Social Infrastructure: Case of Indian Waste Management Sector' (2020) 26(4) *Journal of Infrastructure Systems* 04020040: 1–2.

[119] See also Pratap & Chakrabarti (2017) (n 9) 277.

[120] See Morris (1990) (n 19) 155.

[121] Pratap & Chakrabarti (2017) (n 9) 275–7. See also Adam, Josephson & Lindahl (2017) (n 28) 398.

[122] Pratap & Chakrabarti (2017) (n 9) 264–5, 277.

[123] See further **Part IV: Potential for Reform**. See also Moza & Paul (2018) (n 5) 7.

[124] For example, note the difficulty of managing and mitigating against delays in a context where timelines are not agreed with sufficient clarity at the first instance: Kundu (2021) (n 50) 354–5. See also Pratap & Chakrabarti (2017) (n 9) 232–3; Morris (1990) (n 19) 163–4.

misunderstand their obligations under the contract,[125] which issue applies more so to contractors when they play a lesser role in the formation of the contractual terms.[126]

Contracts which have featured mechanisms such as early collaboration between government and contractor,[127] incentives for early delivery (and disincentives for delays),[128] and which have been built on the basis of risk-sharing rather than risk-transfer,[129] have had some success and the potential for fewer protracted disputes. As accords with this paper's forthcoming discussion of the Australian context (**Part III: The Australian Experience**), scholarship on Indian PPP projects has discussed the dangers of excessive risk allocation away from the public sector to the private sector, which, although prima facie conducive of productivity and cost savings, has the potential actually to cause more problems and cost more in the bigger picture.[130]

C. The Individual Level – Hesitance and Indecision[131]

Turning now to the final question: why, when disputes arise, must they so often continue to the final stages of the dispute resolution process? Why should there be a refusal to invoke non-binding, conciliatory methods of dispute resolution, even in circumstances where their advantages would be obvious and overwhelming?[132]

There is no single reason that motivates every decision by government to escalate disputes to the courts. Factors motivating such decisions may include a lack of trust or experience more broadly in relying on the expertise of dispute boards or similar expert bodies: for instance, it has been noted that when dispute boards combine dispute avoidance and resolution functions, the latter may eclipse the former in the mind of the project partners, leading to an undermining of party trust in the dispute board.[133] There may also be a broader perception that adversarial processes are incompatible with negotiations and attempts at settlement in the interim;[134] in particular, it may be thought that action taken against the government is illegal per se and an affront that must be strenuously resisted,[135] for which note Krishna Iyer J's comments to the effect that government often does this in the name of 'principle'.[136]

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[125] Musenero, Baroudi & Gunawan (2023) (n 29) 8–9.
[126] See ibid, noting the unequal bargaining power of contractors and government in the negotiation of contractual terms: at 6–7.
[127] Dolla & Laishram (2020) (n 118) 382. See also, albeit in a different context, Kamalnath & Kaul (2022) (n 43) 164.
[128] See, eg, Arimoro (2020) (n 11) 112–13.
[129] Ibid 116–17.
[130] Tharun Dolla & Boeing Laishram, 'Bundling/Unbundling Decision in PPP Infrastructure Projects: The Case of Guwahati City, India' (2021) 14(2) *International Journal of Managing Projects in Business* 520, 520–1.
[131] The authors wish to thank Prashanto Chandra Sen for providing helpful references to the judicial elaboration of this problem.
[132] As borne out in the examples described in Musenero, Baroudi & Gunawan (2023) (n 29) 7–8, which include the Nathpa Jhakari Hydro-Electric Project.
[133] Musenero, Baroudi & Gunawan (2023) (n 29) 8.
[134] Baimoldayeva Alina & Zia-Ud-Din Malik, 'Promoting Asian Economic Development by Designing Culturally Conscious Alternative Dispute Resolution (ADR)' (2022) 29(43) *Journal of Legal Studies* 125, 128.
[135] *Urban Improvement Trust, Bikaner v Mohan Lal* (n 61) 516 [10] (Raveendran J for the Court).
[136] *MCD v Rasal Singh* (1976) 2 SCC 179, 180 [1] (Krishna Iyer J), quoted in *Misra & Co v Damodar Valley Corporation* (n 45) 273 [11] (Bhushan J for the Court)

An assessment of the factors motivating decision-making requires that focus shift from the level of national policy to the mindset of individual public servants. Psychological factors become a very serious but complicated topic of inquiry, as their effects are pervasive but difficult to articulate.[137]

In a reasoned dismissal of a Special Leave Petition in 2010 in *Urban Improvement Trust, Bikaner v Mohan Lal*,[138] the Supreme Court provided a survey of previous comments it had made concerning the duty of the government not to engage in vexatious litigation. It concluded that the motivation behind the tendency of government not to settle disputes, but to pursue them to the highest levels of the judiciary, was:

> *... not the policy of Governments or statutory authorities, but is attributable to some officers who are responsible for taking decisions and/or officers in charge of litigation. Their reluctance arises from an instinctive tendency to protect themselves against any future accusations of wrong decision-making, or worse, of improper motives for any decision-making. Unless their insecurity and fear is addressed, officers will continue to pass on the responsibility of decision-making to courts and tribunals.*[139]

Similarly in *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)*:[140]

> *The approach is one of bringing everything to the highest level before this Court, so that there is no responsibility in the decision-making process ... [B]ureaucrats are reluctant to accept responsibility of taking such decisions, apprehending that at some future date their decision may be called into question and they may face consequences post retirement.*[141]

It has been suggested by the Law Commission of India that this mindset has so infected the public service as to have created a de facto 'policy of do nothingness'.[142] Delay caused by inaction at such senior levels is a serious problem, and can seriously jeopardise the delivery of projects. Consider, by way of example, the renovation of the Delhi International Airport in 2003, in which a delay of three years between initial approval of the transaction by the relevant authority and final ministerial approval was a serious concern.[143]

This was the principal[144] finding of the 1988 Law Commission of India report cited above, which concluded that 'resort to court litigation is [often] an escape route for accountability for decision[s]', going so far as to suggest that '[a] social audit might reveal that more than half the litigation involving Government and public sector undertakings is the outcome of irresponsible indifference to

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[137] See especially Adam, Josephson & Lindahl (2017) (n 28), which, while noting that psychological factors did not make a large quantitative contribution to their survey (at 401), stresses that its influence is far more pernicious than mere numbers suggest (at 402). See also *Punjab State Power Corporation Ltd v Atma Singh Grewal* (n 60), in which the Court commented on the 'bureaucratic psyche': at 672 [10] (Radhakrishnan and Sikri JJ).

[138] *Urban Improvement Trust, Bikaner v Mohan Lal* (n 61).

[139] *Urban Improvement Trust, Bikaner v Mohan Lal* (n 61) 516 [10] (Raveendran J for the Court). See similarly *Gurgaon Gramin Brank v Khazani* (n 62), in which the litigiousness of the government was attributed to 'ego clash' or the attempt 'to save the officers' skin': at 782 [2] (Radhakrishnan J for the Court)

[140] (2021) 11 SCC 357.

[141] *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 377 [53] (Kaul J for the Court).

[142] Law Commission of India (1988) (n 43) 9 [2.3].

[143] Arimoro (2020) (n 11) 115.

[144] Law Commission of India (1988) (n 43): 'the lack of accountability in the officer in whom the power vests to determine to initiative litigation or perpetuate the same by preferring appeals is <u>largely</u> responsible for mounting litigation': at 38 [7.1] (emphasis added).

the claim made against it or inability to take affirmative action'.[145] As it was put in a recent survey of the issue of 'indecision' in the Indian administration, to which was alluded in the preface:

> *There is a tendency to either deny the existence of the problem, procrastinate over it, pass the file over to another authority, or dismiss the problem as altogether unsolvable.*[146]

Although outsiders cannot have as detailed a grasp of the causes of the present situation as can those involved in government and industry in India,[147] it seems that the reluctance of project personnel and senior executive actually to resolve disputes arises from a fear of adverse intervention from the Comptroller and Auditor General (CAG), Central Bureau of Investigations (CBI) and Central Vigilance Commission (CVC),[148] and the potential impact of public interest petitions challenging decisions of government or government agencies associated with the finalisation of dispute resolution processes.[149] It is thought better to leave to arbitrators and judges the resolution of these issues than proactively to ensure that they are dealt with and solved in a timely way in the interests of project execution. This problem is, of course, related to the way in which India's policy framework has tainted officials' impression of what constitutes a successful procurement in the infrastructure context.[150] Indecision has become a far more conspicuous concern in light of the COVID-19 pandemic, in which the need to make swift and effective decisions in a wide variety of matter of public importance was paramount.[151]

The CAG exerts the greatest influence by far. It is the largest and oldest (by a considerable margin) of all public vigilance institutions in India, and whereas the functions of the CBI and CVC are limited to corruption, the CAG's mandate extends to encompass a wide variety of auditing and accounting functions.[152]

The traditional approach to public sector auditing may broadly be described as an evaluation of whether rules (laws and policies) were adhered to by government, rather than an assessment of the efficacy of the government's activities with respect to the goal at hand.[153] The goal is 'process-centric', rather than 'outcome-centric'.[154] Whereas the preliminary exercise of accounting for government expenditure is often meticulously (if slowly) completed, the subsequent and arguably more important

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[145] Ibid 8 [2.1].
[146] Sneha P et al (2021) (n 4) 57.
[147] But see ibid, noting in any case that '[w]hile the literature on governmental corruption, capacity constraints, and failure to reform is relatively rich, the area of indecision is less explored': at 56. The authors' survey of international scholarship on public procurement reveals that this is true, although the scholarship cited in this section reflects exceptions to that rule. For a recent study of this issue in the Peruvian context, the arguments and conclusions of which largely concord with those of this paper, see Eric Franco Regjo, 'The Elephant in the Room: Why Do Some Civil Servants Prefer to Delegate Tough Decisions to Tribunals?' (2023) 18(3) *Construction Law International* 48.
[148] On the CVC and CBI, see Hoshiar Singh & Pankaj Singh, *Indian Administration* (Pearson, 2011) 372 et seq; R Sridharan, 'Institutions of Internal Accountability' in Devesh Kapur, Pratap Bhanu Mehta & Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford, 2017) 269, 283–9. Another notable anti-corruption authority is the Lokpal, which, however, is more akin to an ombudsman that deals with complaints from the public, and which has only recently been constituted (and is therefore of less relevance to the issues discussed in this paper). Similar institutions of the States have been merged with the States' other vigilance mechanisms: Rajani Ranjan Jha, 'India's Anti-Corruption Authorities: Lokpal and Lokayukta' (2018) 64(3) *Indian Journal of Public Administration* 502, 504–5, 514. See also Sridharan (2017) (n 148) 289, 295.
[149] The judicial means of public social audit adopted in India may be seen as a fusion of common law and Roman law approaches: see Sir John Bourn, *Public Sector Auditing: Is It Value for Money?* (Wiley, 2007) 4.
[150] As discussed above in **Section B. The National Level – India's Procurement Framework**. See further Sneha P et al (2021) (n 4) 60.
[151] Sneha P et al (2021) (n 4) 56–7.
[152] Sridharan (2017) (n 148) 269–70.
[153] See generally Bourn (2007) (n 149) 34.
[154] Ibid 19. See similarly Sneha P et al (2021) (n 4), advocating for 'outcome-based' decision making rather than 'procedure-based' decision making: at 71–2.

exercise of providing constructive criticism on the activities of government is given relatively little attention.[155] The approach criticised in the context of anti-corruption controls is often described as a 'follow-the-files' rather than 'follow-the-money' approach,[156] which places undue pressure on honest public servants to surround themselves with a paper trail of documents that disclaim any communication with private parties that they might otherwise have fruitfully engaged in.[157]

Long delays in the composition of audit reports are such that the CAG can, typically with great ease, note that certain decisions were ill-advised when considered retrospectively (as oppose to when considered holistically in the context of the decision at the time).[158] When certain individual decisions are sampled for assessment, the impression may be that inconsequential matters are highlighted for criticism,[159] and then retroactively deemed to have caused a much larger problem.[160] Also problematic is the legislative standard by which actions are deemed to have been corrupt: notably, there is an absence of any *mens rea* fault element, such that any inopportune decision that ultimately backfires may be deemed corrupt and attract serious censure.[161] In light of this, collaborating with any private company or individual is inherently risky, and the 'safer' option is always to abstain from making a decision by recording a formal objection, and escalating the dispute to a higher authority, thereby abdicating responsibility for the decision.[162] In addition to abdicating decisions to adjudicatory forms of dispute resolution, there has been a horizontal transferral of responsibility between departments of the executive, often leading to needless inter-departmental coordination, which is itself inevitably productive of delays.[163]

These pressures do not solely exert themselves in the case of complex and politically sensitive issues: even routine decisions contain some risk of reprisal when they become unpopular for extraneous reasons.[164] Nor is maliciousness or corruption always present: inefficiencies may derive from a lack of coordination or policy clarity within the branch of the civil service in question.[165]

It has been argued that a misaligned focus of the CAG may be due to vestiges of its colonial history,[166] during which time it served principally to monitor the police and taxation functions of the Government, rather than inspect executive activity with a view to fostering economic growth.[167]

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[155] Bourn (2007) (n 149) 34–5.

[156] See, eg, KP Krishnan & TV Somanathan, 'The Civil Service' in Devesh Kapur, Pratap Bhanu Mehta & Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford, 2017) 339, 394; Sneha P et al (2021) (n 4) 75.

[157] See Sneha P et al (2021) (n 4) 75–6, quoting Krishnan & Somanathan (2017) (n 156): '[t]he practical effect of this tendency to "investigate by file reading" has led bureaucrats to feel that it is beneficial to "initially oppose on file any request from the private sector, or indeed a private citizen, even if genuine" to manage the risk of prosecution': at 394.

[158] See Sridharan (2017) (n 148) 278.

[159] On the undue focus on trivial matters, see further Robert D Behn, *Rethinking Democratic Accountability* (Brookings, 2001) 215, 217, quoted in Bourn (2007) (n 149) 34.

[160] See Sridharan (2017) (n 148) 278.

[161] Ibid 288; Sneha P et al (2021) (n 4) 75.

[162] Krishnan & Somanathan (2017) (n 156) 393–5.

[163] Sneha P et al (2021) (n 4) 57; Nirvikar Singh, 'Reforming India's Institutions of Public Expenditure Governance' in Devesh Kapur, Pratap Bhanu Mehta & Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford, 2017) 180, 192–3. On the difficulties of such coordination, see further Morris (1990) (n 19) 162.

[164] See Sneha P et al (2021) (n 4), noting that this issue applies in particular to decisions relating to 'procurement' and 'infrastructural development': at 56.

[165] Krishnan & Somanathan (2017) (n 156) 359–60.

[166] See generally Amitabh Mukhopadhyay, 'Foregrounding Financial Accountability in Governance' in Devesh Kapur, Pratap Bhanu Mehta & Milan Vaishnav (eds), *Rethinking Public Institutions in India* (Oxford, 2017) 297, 298–300.

[167] See Paul H Appleby, *Re-examination of India's Administrative System with Special Reference to Administration of Government's Industrial and Commercial Enterprises* (Government of India, 1953) 27–8, 42–3, discussed in Singh & Singh (2011) (n 148) 252–3. Singh & Singh ultimately criticise Appleby's dismissal of the importance

Furthermore, though the CAG's constitutional mandate necessitates a collaborative relationship with the legislature, it has been argued that the CAG has not moved sufficiently away from a pre-colonial approach of hampering progressive legislation.[168]

A 2010 survey of public servants in India revealed that political pressures and, more broadly, 'frustration', were key motivating factors behind the desire of many to resign.[169] In addition to these institutional pressures, individuals in positions of senior executive power are often faced with personal legal complaints, which provide a significant distraction and lead to reputational damage, regardless of their outcome.[170] High rates of pendency in respect of these complaints only amplifies the problem.[171] There is also a high risk of internal demotion, with a 2012 study suggesting that the likelihood of an officer being transferred position exceeded 50%.[172] By contrast, the hierarchies of public organisations typically contain few incentives to motivate creativity or commercial aptitude in public servants.[173] While anti-corruption authorities are responsible for a substantial portion of this 'decisional chill', other social auditing authorities also contribute, by bringing the internal deliberations of members of the executive into public scrutiny.[174]

The aspect of 'organisational design' (referring to the State of India as 'organisation') that Sneha P et al (2021) found to be of prime importance was that of 'intimidation through over-monitoring'.[175] In the same 2010 survey of public servants discussed above, 60% of respondents felt that they had been unfairly targeted by baseless complaints and investigations, a large proportion of which concluded with no finding of wrongdoing.[176]

Beyond motivating a preference for the arbitration and litigation, rather than settlement, of disputes,[177] this indecision permeates the other 'layers' of the problem. For instance, the preference for lowest-cost tenders, and the unwillingness to undertake serious pre-contractual projections and risk assessments, may be attributed to a preference for simple, easily justifiable decisions, rather than more nuanced decisions.[178] Of course, the need for rigorous and stringent anti-corruption controls cannot be ignored. However, where these controls seem to be making a serious contribution to indecision and stagnation in respect of infrastructure projects — indeed, a contribution that arguably outstrips that of the corruption that it is designed to impede[179] — there is need for a serious reconsideration of approach. For that, this paper now turns to the experience in Australia, and to lessons that may be learnt from Australia's approach to infrastructure procurement.

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of the role of the CAG, with which criticism the present authors agree and which criticism does not, however, detract from Appleby's primary point concerning the 'widespread and paralysing unwillingness to decide and act' fostered by overzealous and misoriented public audits.

[168] Sridharan (2017) (n 148) 274–7.

[169] See Ministry of Personnel, Public Grievances and Pension, Department of Administrative Reforms and Public Grievances (DARPG), *Civil Services Survey: A Report* (Government of India, 2010) 38 (Figure 3.3) (available at https://darpg.gov.in/sites/default/files/Civil_Services_Survey_2010.pdf), discussed in Sneha P et al (2021) (n 4) 57.

[170] See Sneha P et al (2021) (n 4) 61.

[171] Sridharan (2017) (n 148) 288.

[172] Sneha P et al (2021) (n 4) 62, 68. See also Singh & Singh (2011) (n 148) 360; Krishnan & Somanathan (2017) (n 156) 362–3.

[173] See Bourn (2007) (n 149) 33.

[174] See Sneha P et al (2021) (n 4), discussing the freedom of information provisions in the *Right to Information Act 2015* (India): at 61. See similarly Krishnan & Somanathan (2017) (n 156) 391–2.

[175] Sneha P et al (2021) (n 4) 61.

[176] Ibid.

[177] See ibid 58.

[178] See ibid 57–8, 63.

[179] See, eg, Krishnan & Somanathan (2017) (n 156) 382.

PART III: THE AUSTRALIAN EXPERIENCE

The motivations driving the present dispute resolution situation in India are different to those in Australia; and although dispute resolution methods such as arbitration have become increasingly uniform across the world, it is important to tailor solutions to problems in their operation to the specific context in question.[180] To this may be added even broader cultural and historical differences (on which this paper has not touched), the influences of which on the present reality are difficult to articulate yet are almost certainly at play.[181] For instance, India has a long-standing and often-cited history of 'mediated' dispute resolution mechanisms via the Panchayats,[182] which now enjoy constitutional recognition.[183]

Thus, it is not suggested that the methods adopted with some success in Australia should be transplanted and adopted literatim in India. However, the problems of time and cost overruns is by no means isolated to India:[184] in 2003, it was estimated that a majority of the 1,778 infrastructure projects funded by the World Bank had exceeded their budget.[185] The worldwide infrastructure deficit could reach US$94 trillion by 2040.[186] Some appreciation of international norms can obviously guide policy decisions.[187] More particularly, a consideration of the history of project dispute resolution in this paper demonstrates that Australia has moved from a position not dissimilar to that of India to one where project disputes rarely proceed to full-scale arbitration or litigation; and those in management of the project and the organisation delivering the project are held accountable for a failure to resolve disputes short of full-scale arbitration or litigation.[188]

What then can be learnt from the Australian experience?

A. Overview

Australia has a long history of developing major infrastructure projects, and doing so through a mix of public and private sector contributions. The Snowy Mountains Scheme, a hydroelectric and irrigation complex in New South Wales that consists of 16 major dams and 225km of tunnels, was constructed between 1949 and 1972, when it was completed on time and on budget. The iconic Sydney Harbour

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[180] See Asiedu & Abaku (2020) (n 21) 67; Catalão, Cruz & Sarmento (2023) (n 30) 1123. See, eg, the cross-jurisdictional differences in the treatment of the 'public policy' exception to the enforcement of arbitral awards, which was discussed above: Bhatia (2018) (n 43) 10; Biswas (2013) (n 51) 101 [7.01]; Hariani (n 84) 162.

[181] See generally Shahrizal M Zin, 'Legalisation of International Arbitration in India: Paving the Way for Cultural Homogenisation?' in Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (Routledge, 2018) 190; Singh & Singh (2011) (n 148) 1–13; Alina & Malik (2022) (n 134) 126–7. See also Sneha P et al (2021) (n 4), noting particularly the distinct colonial history of India: at 70.

[182] See, eg, Alina & Malik (2022) (n 134) 128; *117th Report on The Mediation Bill 2021* (2022) (n 52) 3 [1.4]; Jai (2018) (n 84) 133.

[183] Constitution of India, art 40. Interestingly, it has been argued that certain panchayats possessed a function over and above merely resolving disputes when they arose, in that they contributed (and continue to contribute) more broadly to moderating the daily activities of caste members: Anagha Ingole, *Caste Panchayats and Caste Politics in India* (Palgrave Macmillan, 2021) 11. A certain homophony may be detected between this observation and the bipartite role of dispute avoidance and adjudication boards as advocated below in **Section D. Dispute Avoidance Boards for Project Facilitation**.

[184] See generally Asiedu & Abaku (2020) (n 21) 67.

[185] Daniel Baloi & Andrew DF Price, 'Modelling Global Risk Factors Affecting Construction Cost Performance' (2003) 21(4) *International Journal of Project Management* 261, 261, cited in Adam, Josephson & Lindahl (2017) (n 28) 393.

[186] Catalão, Cruz & Sarmento (2023) (n 30) 1105.

[187] See, eg, in the context of auditing, Sridharan (2017) (n 148) 281–3.

[188] The Supreme Court has noted the success of mediation in government-involved disputes in other countries: *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 379 [58] (Kaul J for the Court).

Bridge, for 80 years after its completion the world's widest long-span bridge, was constructed between 1923 and 1932. Both were funded by government, but delivered by private contractors.[189]

Australia was an early adopter of the Public-Private Partnership (PPP),[190] an arrangement whereby a private sector entity is given temporary (often as long as decades) ownership and management of a public resource for a period of time, after which ownership reverts to the relevant State or the Commonwealth.[191] In 2000, Victoria published a suite of PPP guidelines and policies to codify the processes by which the government could enter into PPPs.[192] These policies were themselves based on the United Kingdom's Private Finance Initiative model, and would come to form the basis of each Australian government's PPP policies.[193] A notable early example of a PPP project in Australia was the Sydney Harbour Tunnel, for which construction commenced in 1988 (and which opened in 1992).[194] Between 1980 and 2005, at least 127 PPP infrastructure projects were led throughout Australia, with a total worth of over $37 billion.[195] Victoria and New South Wales are the States that have made the most use of PPPs since 2000–01, with the former using PPPs primarily for road-related infrastructure, and the latter for road and rail-related infrastructure.[196] Australia continues to be regarded as one of the most developed markets for PPP in the world.[197]

Investment in construction infrastructure by Australian governments has increased in the past few years. The Australia & New Zealand Infrastructure Pipeline (ANZIP), which provides details of ongoing infrastructure projects at their various stages of procurement, has on record 352 major projects in Australia (including 90 prospective procurements, 52 in a detailed planning stage; 110 announced; 68 currently under procurement; and 32 already awarded), with a combined value of approximately $500 billion.[198] The ANZIP Budget Monitors have reported sizeable injections in budget for infrastructure by way of response to COVID-19, such that the 2020–21 budgets of Australian governments, which allocated $225 billion for general government sector infrastructure funding over

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[189] Sebastian Zwalf, 'From Turnpikes to Toll-Roads: A Short History of Government Policy for Privately Funded Public Infrastructure in Australia' (2022) *Journal of Economic Policy Reform* 103, 106. See also M Regan, PED Smith & J Smith, 'Public-Private Partnerships: Capital Market Conditions and Alternative Finance Mechanisms for Australian Infrastructure Projects' (2013) 19(3) *Journal of Infrastructure Systems* 335, 336.

[190] See generally Raymond E Levitt & Kent Eriksson, 'Mitigating PPP Governance Challenges: Lessons from Eastern Australia' in Raymond E Levitt, WR Scott & Michael J Garvin (eds), *Public-Private Partnerships for Infrastructure Development: Finance, Stakeholder Alignment, Governance* (Elgar, 2019) 104, 107; Zwalf (2022) (n 189) 107.

[191] See further Linda M English, 'Public Private Partnerships in Australia: An Overview of Their Nature, Purpose, Incidence and Oversight' (2006) 29(3) *University of New South Wales Law Journal* 250, 251; Colin Duffield & Peter Raisbeck, *Performance of PPPs and Traditional Procurement in Australia* (Research Report, Infrastructure Partnerships Australia, January 2007) 10 [2.1] (available at https://infrastructure.org.au/wp-content/uploads/2016/12/IPA_PPP_FINAL.pdf)/).

[192] See Department of Treasury and Finance (Victoria), *Partnerships Victoria* (June 2000) (available at https://www.dtf.vic.gov.au/sites/default/files/2018-01/Partnerships%20Victoria%20Policy%20-%20June%202000.pdf).

[193] See further English (2006) (n 191) 252.

[194] See Peter Raisbeck, Colin Duffield & Ming Xu, 'Comparative Performance of PPPs and Traditional Procurement in Australia' (2010) 28(4) *Construction Management and Economics* 345, 345–6.

[195] See further English (2006) (n 191) 256.

[196] See https://infrastructure.org.au/chart-group/public-private-partnerships-by-jurisdiction/.

[197] Zwalf (2022) (n 189) 103–4; House of Representatives Standing Committee on Infrastructure, Transport and Cities, Parliament of the Commonwealth of Australia, *Government Procurement: A Sovereign Security Imperative* (March 2022) 90 [5.66] (available at https://www.aph.gov.au/Parliamentary_Business/Committees/House/Former_Committees/ITC/Gov-fundedInfrastructure/Report).

[198] See 'Infrastructure Pipeline by Project Status', *Australia New Zealand Infrastructure Pipeline* <https://infrastructurepipeline.org/charts/status-location> (accessed 4 December 2023).

the ensuing four years, exceeded the previous year's budgets by 26% ($46 billion);[199] with the latest budgets' $254.8 billion exceeded its predecessor by a further 2.7%.[200] The total value of infrastructure projects that were commenced to respond *directly* to the pandemic is approximately $77 billion, serving as a means of stimulating the economy through a relatively stable industry.[201] Infrastructure comprises 20% of Australia's GDP.[202]

Most infrastructure projects in Australia are delivered by State governments. To take New South Wales, Australia's most populous state, as an example, its government invested $178.3 billion in infrastructure between 2011–12 and 2020–21.[203] According to the 2022–23 Half-Yearly Review of the NSW Budget, the NSW Government is due to deliver $116.6 billion over the next four years until 2025–26.[204] Infrastructure expenditure has comprised 3% of NSW's GDP since 2011, 1% higher than the OECD average.[205] The Commonwealth government's role is generally to provide additional or complementary funding for such State projects. As a result, most major infrastructure projects are jointly funded by the Commonwealth government and the relevant State governments.[206] However, the role of the Commonwealth government in the procurement of major infrastructure projects has increased in recent years.[207] In March 2022, a report by the Commonwealth House of Representatives Standing Committee on Infrastructure, Transport and Cities was published, which acknowledged and sought to respond to the Commonwealth's increasing importance in this regard.[208] It recommended that the Commonwealth: invest in a longer-term infrastructure pipeline, so that plans may be made and projects progressed well in advance of their desired delivery date;[209] develop standardised procurement

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[199] See ANZIP, *Australian Infrastructure: Budget Monitor 2020–21*, 3 (available at https://infrastructure.org.au/wp-content/uploads/2020/12/Australian-Infrastructure-Budget-Monitor.pdf).

[200] See ANZIP, *Australian Infrastructure: Budget Monitor 2022–23*, 3 (available at https://infrastructure.org.au/australian-infrastructure-budget-monitor-2022-23/).

[201] See also for a list of such projects: George Denny-Smith et al, 'How Construction Employment Can Create Social Value and Assist Recovery from COVID-19' (2021) 13(2) *Sustainability* 988: 2.

[202] Infrastructure Australia, *Reforms to Meet Australia's Future Infrastructure Needs: 2021 Australian Infrastructure Plan* (August 2021) 254 (available at https://www.infrastructureaustralia.gov.au/sites/default/files/2021-09/2021%20Master%20Plan_1.pdf) ('*Reforms to Meet Australia's Future Infrastructure Needs*').

[203] Infrastructure NSW, *Staying Ahead: State Infrastructure Strategy 2022–42* (May 2022) 42 (available at https://www.infrastructure.nsw.gov.au/media/3705/state-infrastructure-strategy-2022-2042-full-report.pdf) ('*Staying Ahead*').

[204] NSW Treasury, *NSW Budget: 2022–23 Half-Yearly Review*, 26 (available at https://www.budget.nsw.gov.au/sites/default/files/2023-02/2022-23-Half-Yearly-Budget-Review.pdf). This projection was revised (marginally) to $116.5 billion in the 2023–24 Budget: NSW Treasury, *NSW Budget 2023–24: Budget Statement* (Budget Paper No 1, 19 September 2023) 1-5 (available at https://www.budget.nsw.gov.au/2023-24/budget-papers).

[205] Infrastructure NSW, *Staying Ahead* (2022) (n 203) 40.

[206] House of Representatives Standing Committee (2022) (n 197) 23 [3.1]. The Commonwealth is responsible for approximately 10% of the financial contribution to infrastructure projects around Australia: at 24 [3.6].

[207] On 14 November 2023, the Commonwealth Government published an *Infrastructure Policy Statement*, in which it sought to clarify its commitment to 'nationally significant' infrastructure projects. In respect of these projects (the criteria for inclusion are defined in the Statement), the Government's position is now that it will contribute an equal proportion of the funding as the relevant State Government, although it may increase the proportion of its funding on a case-by-case basis. It remains to be seen how this will impact the progress of major Australia infrastructure projects as the demand for infrastructure increases going into the future. The Statement is available at https://www.infrastructure.gov.au/sites/default/files/documents/infrastructure-policy-statement-20231114.pdf.

[208] House of Representatives Standing Committee (2022) (n 197).

[209] Ibid 14–18 [2.17]–[2.31].

mechanisms to improve productivity;[210] improving risk management;[211] and unbundle megaprojects into smaller and more sustainable packages.[212]

In October 2022, an independent review was conducted of Infrastructure Australia,[213] a Commonwealth body designed to provide independent, expert-based advice to Commonwealth procurement agencies.[214] The review recommended that Infrastructure Australia be given a more clearly-defined mandate and assume a more primary role in ensuring the effective procurement by the Commonwealth of public infrastructure works, given the Commonwealth's increasing contribution to Australia's infrastructure demand.[215] The Commonwealth government has responded to the review.[216]

With the delivery of the 2023–24 Federal Budget in May 2023, it was announced that the Commonwealth Government would maintain its commitment to a $120 billion 10-year infrastructure pipeline,[217] however this figure may be due to change bearing in mind the recent findings of the Independent Strategic Review on the Commonwealth infrastructure programme.[218]

B. History of Reform

As with the United States, the construction of major projects in Australia was very adversarial until the 1990s. Throughout the late 1980s, there were substantial increases in contractual claims and disputes.[219]

Two principal developments emerged in the Australian construction industry in the 1990s:

1) Alternative Dispute Resolution (ADR):

   In 1990, a joint report of the Joint Working Party of the National Building Construction Council and the National Public Works Council was published.[220] It recommended, inter alia, that arbitration and litigation be avoided in the handling of construction disputes, and that genuine attempts be made instead at negotiation and ADR processes, with a view to

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[210] Ibid 45–7 [4.29]–[4.37].
[211] Ibid 50–2 [4.48]–[4.57].
[212] Ibid 112–14 [6.40]–[6.49].
[213] See Nicole Lockwood & Mike Mrdak, *Independent Review of Infrastructure Australia* (October 2022) (available at https://www.infrastructure.gov.au/have-your-say/independent-review-infrastructure-australia).
[214] See further https://www.infrastructureaustralia.gov.au/what-we-do.
[215] Lockwood & Mrdak (2022) 5–8 (n 213).
[216] See Department of Infrastructure, Transport, Regional Development, Communications and the Arts, *Australian Government Response to the Independent Review of Infrastructure Australia* (December 2022) (available at https://www.infrastructure.gov.au/sites/default/files/documents/australian-government-response-to-the-independent-review-of-infrastructure-australia.pdf).
[217] Department of the Treasury, *Budget 2023–24: Stronger Foundations for a Better Future* (May 2023) 44 (available at https://budget.gov.au/content/overview/download/budget_overview-20230511.pdf). See more recently, committing to the $120 billion pipeline, Catherine King (Minister for Infrastructure, Transport, Regional Development and Local Government), 'Setting Our Infrastructure Priorities' (Media Release, 14 November 2023) (available at https://minister.infrastructure.gov.au/c-king/media-release/setting-our-infrastructure-priorities).
[218] See Clare Gardiner-Barnes, Mike Mrdak & Reece Waldrock, *Independent Strategic Review of the Infrastructure Investment Program: Executive Summary*, 16 November 2023 (available at https://www.infrastructure.gov.au/department/media/publications/independent-strategic-review-infrastructure-investment-program-executive-summary).
[219] Farshid Rahmani, Malik MA Khalfan & Tayyab Maqsood, 'Lessons Learnt from the Use of Relationship-Based Procurement Methods in Australia: Clients' Perspectives' (2016) 16(2) *Construction Economics and Building* 1, 3, discussing T Kwok & K Hampson, 'Strategic Alliances between Contractors and Subcontractors: A Tender Evaluation Criterion for the Public Works Sector' in *Construction Process Re-Engineering: Proceedings of the International Conference on Construction Process Re-Engineering Held at the Gold Coast, Queensland, Australia on 14–15 July 1997* (1997).
[220] See NPWC/NBCC Joint Working Party, *No Dispute: Strategies for Improvement in the Australian Building and Construction Industry* (Report, 1990).

minimising cost and delay.[221] ADR has since become a mainstay in the resolution of construction disputes.[222]

2) Collaborative Contracting – Partnering:

In 1992, the Royal Commission into Productivity in the Building Industry released its Final Report on its eponymous topic. Among the recommendations made were that relevant government authorities seriously consider partnering-style contracting, with a view to averting the trends towards adversarialism that were having a detrimental impact on the successful delivery of projects.[223]

Partnering is a form of relational contracting which prioritises the eponymous "partnership" or relationship.[224] To that end, it eschews formal, contractual arrangements for agreements expressed at a high level as between partners that reflect their commitment to open collaboration.[225] As a result, these partnering principles are not legally enforceable, even though there may be intrinsic incentives in maintaining the partnership.[226] Whereas partnering, in the sense of creating long-term, strategic alliances between contractors and clients, has a long history, the practice of partnering for single projects at a time is associated with Charles Cowan, who pioneered the practice in the US Army Corps of Engineers.[227] In such projects, a small group of representatives of the various partners in the project would typically meet and exercise a supervisory role with respect to the various stages of delivery.[228] Partnering became widespread in the 1990s, with $30 billion worth of construction projects either being delivered or having been delivered by 2002.[229]

While ADR has continued in Australia and developed into various forms, partnering has not survived in its form as originally intended.[230] What emerged instead in the late 1990s and early 2000s was a form

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[221] See Ajibade Ayodeji Aibinu, Lola Akin-Ojelabi & Blair Gardiner, 'Construction Mediation in Australia' in Penny Brooker & Suzanne Wilkinson (eds), *Mediation in the Construction Industry: An International Review* (Routledge, 2010) 19, 25.

[222] See, eg, *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (2011) 244 CLR 305; [2011] HCA 38, 315 [25] (French CJ, Crennan and Kiefel JJ). See generally Donald Charrett, *Contracts for Construction and Engineering Projects* (Routledge, 2nd ed, 2021) 331–8.

[223] See NSW Branch, Australian Federation of Construction Contractors, 'Royal Commission into Productivity in the Building Industry: Overview of the Royal Commission's Findings and Recommendations' (1992) 25 *Australian Construction Law Newsletter* 34, 40.

[224] Ian R Macneil, 'The Many Futures of Contract' (1974) 47(3) *Southern California Law Review* 691, 721.

[225] See Richard Morwood, Deborah Scott & Ian Pitcher, *Alliancing: A Participant's Guide: Real Life Experiences for Constructors, Designers, Facilitators and Clients* (AECOM, 2008) 18 (available at http://leaninpublicsector.org/wp-content/uploads/2019/05/Richard-Morwood-Ian-Pitcher-Deborah-Scott-2010-alliancing-a-participant%E2%80%99s-guide-AECOM2010web.pdf); Rahmani, Khalfan & Maqsood (2016) (n 219) 2.

[226] Ian R Macneil, 'Relational Contract Theory: Challenges and Queries' (2000) 94(3) *Northwestern University Law Review* 877, 879–80; Pablo Marcello Baquero, 'Collaborative Inter-Firm Innovation in the Frontiers of the Knowledge Economy: Preliminary Marks towards Rethinking Private Law for the New Economy' (Report, 2017) 3.

[227] Jon Gunn, *The Effective Use of Partnering and Alliancing* (MinterEllison, 2002) 5 (available at http://alliancecontractingelectroniclawjournal.com/wp-content/uploads/2017/04/Gunn-J.-2002-%E2%80%98The-Effective-Use-of-Partnering-and-Alliancing%E2%80%99.pdf).

[228] Cyril Chern, *The Law of Construction Disputes* (Routledge, 3rd ed, 2020) 37; Adam K Bult et al, 'Dispute Avoidance and Alternative Dispute Resolution' in Paul Levin (ed), *Construction Contract Claims, Changes, and Dispute Resolution* (American Society of Civil Engineers, 3rd ed, 2016) 347.

[229] See Gunn (2002) (n 227) 8–9.

[230] Ibid 4.

of collaborative contracting known as alliancing,[231] which first appeared in oil, gas and mining projects in Western Australia.[232] In such alliance contracts, the project owner (ie, the relevant government body) retains a much greater degree of involvement and interaction with the project's delivery team than in, for example, a conventional PPP.[233]

At the heart of alliancing lies the commitment to share the risks associated with the project equitably, and to foster a culture of 'no blame' amongst the participants.[234] Before entering an alliance contract, painshare/gainshare formulae are agreed upon, detailing how profits or losses will be allocated amongst alliance partners,[235] with a view to incentivising parties only to interest themselves in the overall success of the project, rather than in maximising their individual profits.[236] Though the contractor notionally still bears the primary risks of the project, the risk allocation is such that it cannot lose its overhead or make a capital loss on the project.[237]

By contrast to partnering agreements,[238] alliance contracts may explicitly contain a legally-binding 'no-dispute' clause, such as one whereby all rights of suit in connection with project-related events are waived[239] (perhaps with the exception of 'wilful default').[240] They do, however, like partnering agreements, also rely more broadly on relational contracting principles to create this culture.[241] Supporting this are a number of structural factors, such as the need for consensus decision-making across the project alliance board (PAB), alliance leadership team (ALT), consisting of senior executives from the alliance partners, or alliance management team (AMT), which manages the individual projects.[242] The Australian National Audit Office, in its 2001 contract management guide, suggested that these arrangements are the most critical means of ensuring collaboration in alliance project delivery.[243]

Alliancing contracts enjoyed a short period of success and widespread use. From 2004 to 2009, the total value of infrastructural alliance projects (in road, rail and water sectors) across New South

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[231] For an overview, see Gang Chen et al, 'Overview of Alliancing Research and Practice in the Construction Industry' (2012) 8(2) *Architectural Engineering and Design Management* 103, 103–4.
[232] Rahmani, Khalfan & Maqsood (2016) (n 219) 3.
[233] Derek Henry Thomas Walker, James Harley & Anthony Mills, 'Performance of Project Alliancing in Australasia: A Digest of Infrastructure Development from 2008 to 2013' (2015) 15(1) *Construction Economics and Building* 1, 2.
[234] See, eg, Stephen Rowlinson et al, 'Alliancing in Australia: No-Litigation Contracts: A Tautology?' (2006) 132(1) *Journal of Professional Issues in Engineering Education and Practice* 77, 77–8.
[235] Walker, Harley & Mills (2015) (n 233) 3.
[236] Derek HT Walker & Michael Keniger, 'Quality Management in Construction: An Innovative Advance Using Project Alliancing in Australia' (2002) 14(5) *TQM Magazine* 307, 309.
[237] Andrew Stephenson & Brendan Molck, 'Alliancing in Australia: Commercial Advantage at the Expense of Legal Certainty?' (2017) 33(2) *Building and Construction Law Journal* 99, 101. See further Chen et al (2012) (n 231) 104, 108.
[238] See Morwood, Scott & Pitcher (2008) (n 225) 18, cited in Walker, Harley & Mills (2015) (n 233) 3.
[239] Allan J Hauck et al, 'Project Alliancing at National Museum of Australia: Collaborative Process' (2004) 130(1) *Journal of Construction Engineering and Management* 143, 145; Andrew Chew, 'Alliancing in Delivery of Major Infrastructure Projects and Outsourcing Services in Australia: An Overview of Legal Issues' (2004) 21(3) *International Construction Law Review* 319, 328.
[240] Chew (2004) (n 239) 337.
[241] See especially Rowlinson et al (2006) (n 234) 79–81; Matton Van Den Berg & Peter Kamminga, 'Optimising Contracting for Alliances in Infrastructure Projects' (2006) 23(1) *International Construction Law Review* 59, 73.
[242] Walker, Harley & Mills (2015) (n 233) 2, citing D Walker, B Lloyd-Walker & Anthony Mills, 'Facilitating a No-Blame Culture through Project Alliancing' (2014) 8 *Project Perspectives* 58.
[243] See ANAO, *Contract Management: Better Practice Guide* (February 2001), discussed in Rowlinson et al (2006) (n 234) 80.

Wales, Victoria, Queensland and Western Australia was $32 billion,[244] representing 29% of the total spend of $110 billion in those sectors.[245] However, following a research study of October 2009, led by Evans & Peck and the University of Melbourne on behalf of the New South Wales, Queensland and Victoria governments, which, although it generally recommended that alliancing continue to be used,[246] exposed some areas of concern and uncertainty,[247] alliancing fell out of favour and was rarely used thereafter.[248]

Whereas aspects of the collaboration that alliance contracting encourages are obviously appealing to all parties, State governments have been hesitant to proceed with full-scale alliance arrangements.[249] Where they have, Infrastructure Australia has cautioned that that is due to the specific circumstances lying behind those alliances, and that they cannot be taken at face value as evidence of alliance contracts' effectiveness.[250]

An inevitable consequence of using relationship-based contracting techniques is the fear that other parties might not reliably foster a collaborative relationship according to the spirit of the arrangement.[251] Traditional contracts, which prioritise the ability of parties to bargain for arrangements that best suit them and their profit incentives, are naturally more attractive to parties when there is the perception that the relationship may devolve or revert to an adversarial one.[252] As such, in the 2000s and 2010s, State government Treasury departments took much greater control of project budgets and procurement methods by state delivery agencies.

This has led to a greater transfer of risk to contracting industry as Treasury departments have desired more certainty of budgeting for these projects.[253] For example, a 2021 survey by Infrastructure Australia found that 88% of private industry respondents believed that integration risk should be shared, compared to only 61% of government respondents.[254] This approach inevitably led to much more adversarial relationships between State governments that were procuring the projects and the contractors that were delivering them,[255] with a greatly increased number of claims and formal dispute resolution through arbitration and litigation.[256]

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[244] Evans & Peck & University of Melbourne, *In Pursuit of Additional Value: A Benchmarking Study into Alliancing in the Australian Public Sector* (Research Paper, Department of Treasury and Finance, Victoria, October 2009) 7 (available at https://www.infrastructureaustralia.gov.au/sites/default/files/2019-06/PC_Submission_Attachment_L.pdf), cited in Walker, Harley & Mills (2015) (n 233) 2.
[245] Evans & Peck & University of Melbourne (2009) (n 244) 8.
[246] See ibid 91–2.
[247] See especially ibid 9, 32–3.
[248] See Stephenson & Molck (2017) (n 237) 103–4.
[249] House of Representatives Standing Committee (2022) (n 197) 88 [5.59].
[250] Ibid 89 [5.63].
[251] Rahmani, Khalfan & Maqsood (2016) (n 219) 7.
[252] Although it of course remains open to parties in traditionally-negotiated contracts strategically to avoid fulfilling their duties: Daniel Markovits & Alan Schwartz, '(In)Efficient Breach of Contract' in Francesco Parisi (ed), *The Oxford Handbook of Law and Economics: Volume 2: Private and Commercial Law* (Oxford University Press, 2018) 20, 20.
[253] See, eg, Infrastructure Australia, *A National Study of Infrastructure Risk: A Report from Infrastructure Australia's Market Capacity Program* (October 2021) 31, 33 (available at https://www.infrastructureaustralia.gov.au/national-study-infrastructure-risk).
[254] Ibid 46.
[255] Ashurst, Australian Constructors Association & Infrastructure Partnerships Australia, *Scope for Improvement 2014: Project Pressure Points: Where Industry Stands* (2014) 17 (available at https://www.constructors.com.au/wp-content/uploads/2019/11/Scope-for-Improvement-2014.pdf). See also Blake Dawson Waldron & Australian Constructors Association, *Scope for Improvement: A Survey of Pressure Points in Australian Construction and Infrastructure Projects* (2006) 11, 22–3, 26 (available at https://mosaicprojects.com.au/PDF-Gen/BDW_Scope_for_Improvement_2006_Full.pdf).
[256] Ashurst, Australian Constructors Association & Infrastructure Partnerships Australia (2014) (n 255) 20–1.

More broadly, however, collaborative forms of contracting (eg, ECI) remain popular means of improving cost estimates and ensuring value for money under the States' procurement guidelines.[257] For example, Sydney Water continues to employ collaborative delivery-partner arrangements, including in a $500 million upgrade to three major waste-water treatment plants in NSW.[258] Early stage communication between government and industry is universally recommended in the infrastructure policies of Australian governments.[259]

The following Section considers how recent changes in approach to the procurement of infrastructure works in Australia reflect and respond to this history, bearing in mind the need to balance the advantages and drawbacks of collaborative procurement arrangements.

C. Changes in Policy and Approach

As a result of the increase in disputation discussed above, arbitration and litigation, Commonwealth and State delivery agencies have taken the view that there was a better way of collaborating with the construction industry and resolving disputes more expeditiously, with a view to ensuring that the fundamental task of ensuring efficient project delivery be fulfilled. This has led to a greater use of ADR and implementation of expert determination, often on a binding basis.[260] It has also spurred more intensive scrutiny and efforts at reform on the part of Commonwealth and State government agencies with regard to their infrastructure procurement methodologies: all of which will be discussed in this Section below.

i. Audit Reports

The Australian National Audit Office (ANAO) conducts performance audits of, inter alia, major Commonwealth procurements. For example, it conducts a yearly review of Commonwealth defence procurements.[261] The ANAO has as recently as April 2023 published a performance audit on the topic of the handling of procurement complaints under the *Government Procurement (Judicial Review) Act 2018* (Cth). Its recommendations stressed that inadequate complaint processes were originally, and continue to be, a significant barrier to businesses participating in Commonwealth procurement.[262] Looking ahead, the ANAO has identified 'procurement and contract management' as one of the key focus areas of is work for 2023–24.[263]

In undertaking a Performance Audit, the Auditor-General has extremely wide powers to access people, documents, records and correspondence to assist it in undertaking its task. At the conclusion of

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[257] See House of Representatives Standing Committee (2022) (n 197) 41 [4.11].

[258] Ibid 82–3 [5.36]–[5.39]. See further https://www.sydneywater.com.au/water-the-environment/what-we-are-doing/current-projects/servicing-growth-areas.html.

[259] See, eg, Infrastructure Australia, *Reforms to Meet Australia's Future Infrastructure Needs* (2021) (n 202) 267.

[260] See, eg, *Shoalhaven City Council v Firedam Civil Engineering Pty Ltd* (n 222).

[261] See, eg, ANAO, *Major Projects Report 2021–22* (Auditor-General Report No 12 of 2022–23, 9 February 2023) (available at https://www.anao.gov.au/work/major-projects-report/2021-22-major-projects-report). A report for 2022–23 was commenced in November 2023: see https://www.anao.gov.au/work/major-projects-report/2022-23-major-projects-report).

[262] See ANAO, *Procurement Complaints Handling* (Auditor-General Report No 19 of 2022–23, Performance Audit, 6 April 2023) [1.11] (available at https://www.anao.gov.au/work/performance-audit/procurement-complaints-handling). More recent (but slightly less consequential as regards this paper) reports by the ANAO on the topic include ANAO, *Department of Defence's Procurement of Hunter Class Frigates* (Auditor-General Report No 21 of 2022–23, Performance Audit, 10 May 2023); ANAO, *Procurement of the Permissions Capability* (Auditor-General Report No 34 of 2022–23, Performance Audit, 7 June 2023); ANAO, *Procurement of Office Furniture* (Auditor-General Report No 37 of 2022–23, Performance Audit, 14 June 2023).

[263] ANAO, *Annual Audit Work Program 2023–24: Overview* (available at https://www.anao.gov.au/work-program/overview).

a Performance Audit, the Auditor-General usually submits the draft Audit Report to Management for fact checking (not for debate). Upon completion of fact checking, the Auditor-General tables its Performance Audit in Parliament, where it is therefore open to public scrutiny.

Performance audits by Auditors-General of the Australian governments are limited in that they generally may not comment directly on the efficacy of government policy.[264] For example, the ANAO's *Guide to Conducting Performance Audits* specifies that '[t]he ANAO does not have a role in commenting on the merits of government policy',[265] and the *Government Sector Audit Act 1983* (NSW) restricts the auditing powers of the Auditor-General to assessing the operations of the relevant entity 'in relation to achieving the State purpose' for which it is funded (and not commenting on that purpose).[266] Historically speaking, audits were limited such that they could not comment on the effectiveness of the government entity in achieving the relevant goal, but only on the efficiency and economy with which it attempted to do so.[267] However, 'economy', 'efficiency', 'effectiveness' and 'legislative and policy compliance' are now all within the scope of that upon which performance audits may comment.[268] For example, a 2006 survey of all Australian performance audits on PPP projects noted that they largely focused on 'substantive matters', namely the actual effectiveness of the PPP at achieving its stated goal.[269] By commenting on the adherence of Government entities to procurement principles and to project-specific agreements, these audits may illuminate deficiencies on the path to ensuring the delivery of projects, and can be instructional of good practice to avoid encountering delay and excessive expenditures in other contexts.

A comprehensive survey of ANAO performance audits on major Commonwealth infrastructure initiatives (and corresponding performance audits at the State level) is beyond the scope of this paper. However, a study of a cross-section of performance audits concerning major infrastructure projects and other procurements reveals that stress has been placed on the importance of effective dispute resolution procedures to ensuring that projects reach timely delivery.[270] For example, a 2000 performance audit surveying the Commonwealth's electricity procurement arrangements noted an improvement in the effectiveness of energy supply contracts that was commensurate to the increasing uptake of, inter alia, standardised dispute resolution procedures in contracts.[271] More detailed treatments of the topic include, for example:

1) In 1997, a performance audit of the Sydney Airport Noise Amelioration Program highlighted the importance of well-defined alternative dispute resolution mechanisms as a counterpoint to

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[264] See English (2006) (n 191) 260.

[265] ANAO, *Guide to Conducting Performance Audits* (31 March 2017) (available at https://www.anao.gov.au/work/corporate/guide-to-conducting-performance-audits).

[266] *Government Sector Audit Act 1983* (NSW) ss 38C(a), 38EA(3) (available at https://legislation.nsw.gov.au/view/html/inforce/current/act-1983-152).

[267] See further Lee D Parker & James Guthrie, 'Performance Auditing: The Jurisdiction of the Australian Auditor General: De Jure or De Facto?' (1991) 7(2) *Financial Accountability & Management* 107, 109–10.

[268] ANAO, *Guide to Conducting Performance Audits* (2017) (n 265). See also *Government Sector Audit Act 1983* (NSW) s 38EA(1): '[t]he Auditor-General may, when the Auditor-General considers it appropriate, conduct an audit … of all or any particular activities of an auditable entity to determine whether the auditable entity is carrying out its activities *effectively* and doing so *economically* and *efficiently* and *in compliance with all relevant laws*'. (emphasis added).

[269] English (2006) (n 191) 261–2. Audit reports have been used similarly with respect to UK PFIs: see Raisbeck, Duffield & Xu (2010) (n 194) 347.

[270] See, eg, Audit Office of NSW, *2016: An Overview* (New South Wales Auditor-General's Report, 30 March 2017) 20 (available at https://www.audit.nsw.gov.au/our-work/reports/_016---an-overview).

[271] ANAO, *Commonwealth Electricity Procurement* (Audit Report No 25 of 1999–2000, Performance Audit, 5 January 2000) [3.30], [3.33]–[3.34] (available at https://www.anao.gov.au/work/performance-audit/commonwealth-electricity-procurement).

areas of ambiguity in the contract, particularly in terms of contractual variations for the prices of services.[272] Although there were no specified procedures for the initiation or criteria of such variations, a detailed dispute resolution procedure, which contemplated 'maximum negotiation and discussion', was sufficient to avoid protracted disputes.[273] The performance audit highlighted also the need for increased specificity in procedures between public and private sector entities, as opposed merely to those between government agencies. However, the lack of clear communication and dispute resolution channels between the contractors and government caused serious delays to certain parts of the program. This was especially a problem due to the size and complexity of the individual projects, and caused the contractors to adopt a 'strictly legal approach' to the performance of the work, which ultimately caused delays.[274] While remedial mediation and arbitration mechanisms established after the commencement of disputes had some success, that success was vitiated by the delay in their establishment.[275]

2) In 2012, a performance audit of the M113 Upgrade Project (an upgrade of the Department of Defence's fleet of armoured vehicles) considered the effectiveness of negotiations between the Department of Defence and the primary contractor to resolve delays in project delivery. The performance audit described the negotiating process by which the Department of Defence was forced to resile from its initial negotiating position on the basis that it was unclear whether it could rely on contractual dispute resolution mechanisms, as the parties had been proceeding beyond the scope of the contract for some years.[276] This led to a reassessment of the parties' negotiating positions, and a revision of the contract with the goal of developing 'a new, realistic production schedule, and to provide contractual certainty', with the Department of Defence stating that 'a commercial "win/win" solution was required, irrespective of the contractual issues—which were subject to interpretation by both parties'.[277] A revised delivery date with incentive payments was considered more attractive than a protracted dispute with delays to the project.[278] Though the performance audit highlighted undesirable related consequences, it approved of the effective resolution of this issue.[279]

3) In 2022, a performance audit of the contract management framework in Queensland considered the role of dispute resolution in the management of contractual variations. The six contracts that were reviewed had a combined value of $1.4 billion, of which over $127 million consisted in contract variations.[280] While the audit did not focus on dispute resolution, it noted that outdated technology used for the purposes of contract management had a series of corollaries, including inhibiting the ability to track the overall progress of the contract, as well as the ability

[272] Echoing conclusions from a Report of the Senate Select Committee: see ANAO, *Sydney Airport Noise Amelioration Program* (Performance Audit, 25 November 1997) Appendix 2 (available at https://www.anao.gov.au/work/performance-audit/sydney-airport-noise-amelioration-program).
[273] Ibid [2.42]–[2.44].
[274] Ibid [2.50]–[2.57].
[275] Ibid [2.55], [2.66].
[276] ANAO, *Upgrade of the M113 Fleet of Armoured Vehicles* (Audit Report No 34 of 2011–12, Performance Audit, 24 May 2012) [4.8]–[4.12] (available at https://www.anao.gov.au/work/performance-audit/upgrade-the-m113-fleet-armoured-vehicles).
[277] Ibid [4.14]–[4.15].
[278] Ibid [4.16], [4.24]–[4.28].
[279] Ibid [4.46].
[280] Queensland Audit Office, *Contract Management for New Infrastructure* (Audit Report No 16 of 2021–22, Performance Audit, 17 May 2022) 2 (available at https://www.qao.qld.gov.au/reports-resources/reports-parliament/contract-management-new-infrastructure).

to track and respond to disputes.[281] Poor document management was said to impact not only on effective forward planning, but also on the ability of dispute teams effectively to support their arguments and resolve disputes swiftly.[282] It reported mixed findings on the Government's project teams with respect to the recording, escalating and resolving of contractual disputes: while some had been handled collaboratively, quickly and effectively, one claim (a contractor's claim for over $1 million of additional costs relating to COVID-19 safety rules) was being negotiated for over 15 months.[283]

4) In 2022, the ANAO conducted a performance audit of Snowy 2.0 (discussed in further detail below), whose contract establishes a Dispute Avoidance/Adjudication Board (DAAB), the costs of which are shared between Snowy Hydro and the contractor, as the first place to which the parties have recourse in the event of a dispute.[284] Overall, the average amount paid by Snowy Hydro to the contractor under regular claims under the contract was less than half the amount claimed, despite which there have been no disputes on this topic referred to the dispute board.[285] The performance emphasised the role of the DAAB at avoiding disputes and facilitating negotiations, in which connection it was noted that the DAAB arranged for the contracting parties to participate in workshops that allowed them to agree on a contractual variation that obviated the need for further extensions of time or increase to project cost.[286]

More broadly, the ANAO consistently monitors practices that pertain to proper governance, and the early-stage identification and management of risks, both of which are necessary to facilitate the timely delivery of projects on budget. The Audit Office of NSW has commenced work on a report entitled 'Procurement of Mega Transport Projects', which analysis the effectiveness of Government procurement in this sector, 'with a particular focus on the project initiation, planning and development, procurement and delivery stages'.[287]

In some States (for example, New South Wales), there are additional reports and investigations undertaken by an external independent body (usually Infrastructure NSW). Infrastructure NSW undertakes regular (at least six-monthly) reviews, known as 'Health Checks' of particular projects determined by the Government (often projects in excess of $100 million). During these Health Checks, Infrastructure NSW has access to both the principal (usually a Government agency or department) and the counter-part private sector contractor. In its final Health Check Report, made available to the NSW Cabinet and the relevant Department or Agency, Infrastructure NSW will make a number of recommendations.[288]

The ANAO has conducted performance audits of both Snowy 2.0 and the Western Sydney Airport, two recent Commonwealth-procured projects that provide suitable case studies for the role of the ANAO in improving the efficiency of Australian infrastructure projects.

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[281] Ibid 8.
[282] Ibid 13.
[283] Ibid 21.
[284] ANAO, *Snowy 2.0 Governance of Early Implementation* (Auditor-General Report No 33 of 2021–22, Performance Audit, 15 June 2022) [3.59] (available at https://www.anao.gov.au/work/performance-audit/snowy-20-governance-early-implementation).
[285] Ibid [3.52]–[3.54].
[286] Ibid [3.57], [3.60].
[287] See https://www.audit.nsw.gov.au/our-work/reports/procurement-of-mega-transport-projects.
[288] See further 'Health Checks', *Infrastructure NSW* <https://www.infrastructure.nsw.gov.au/investor-assurance/project-assurance/resources/nsw-gateway-reviews/health-checks/>.

Snowy 2.0

Snowy 2.0 is a hydroelectric power project designed to add 2000 megawatts of on-demand electricity and approximately 350,000 megawatt hours of large-scale storage to the National Electricity Market (NEM). The project contemplates the construction of an underground power station and around 27 kilometres of tunnels in the Snowy Mountains region of New South Wales.[289] The entity responsible for the delivery of Snowy 2.0 is Snowy Hydro Ltd, which made its final investment decision to proceed with the project in December 2018.[290] Snowy Hydro Ltd is a Government Business Enterprise (GBE) which, since the Commonwealth completed its acquisition of the 58% and 29% of shares respectively owned by the New South Wales and Victorian governments on 29 June 2018, has been wholly owned by the Commonwealth.[291]

As part of the final investment decision, the business case put forward considered a number of outcomes, including detailed simulations based on projections of two cases: Snowy 2.0 is developed; and Snowy 2.0 is not developed.[292] The decision also involved a consideration of funding requirements to respond to four eventualities of capital expenditure, including a 'low case' estimate of $5.4 billion, and a 'worst case' estimate of $6.9 billion.[293]

In 2017, when the feasibility of the project was being assessed prior to the final investment decision, four potential contracting approaches were considered, which different in terms of the nature and number of the contracts to be used, as well as in terms of their management (whether in-house or by way of consultant).[294] It was ultimately decided that Snowy 2.0 would be delivered under an EPC (engineer, procure and construct) contract,[295] the terms of which are based on the FIDIC 'Conditions of Contract for EPC/Turnkey Projects'.

According to a Statement of Expectations issued by the Government on 28 October 2021, the Government was committed to providing $1.38 billion to Snowy Hydro to facilitate the delivery of Snowy 2.0.[296] The remainder of the project would be financed through debt funding.[297]

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[289] ANAO, *Snowy 2.0 Governance of Early Implementation* (2022) (n 284) [1].
[290] Ibid.
[291] Snowy Hydro, *Annual Report for the Financial Period Ended 30 June 2018*, 3 (available at https://www.snowyhydro.com.au/wp-content/uploads/2020/04/FINAL-SIGNED-24.09.18-Snowy-Hydro-Limited-Financial-Statements-for-the-Year-Ended-30-June-2018-2.pdf).
[292] See, eg, Marsden, Jacob & Associates, *Modelling Snowy 2.0 in the NEM* (Public Report, 3 December 2018) 13 (available at https://www.snowyhydro.com.au/wp-content/uploads/2020/04/MJA-NEM-Study-Public-Report-3Dec2018.pdf).
[293] ANAO, *Snowy 2.0 Governance of Early Implementation* (2022) (n 284) [2.18].
[294] See Snowy Hydro, *Study Report: Chapter Eleven: Project Execution Planning* (December 2017) 12 [4.4.1] (available at https://drive.google.com/file/d/1YV3cvTcT6iboCKYK-TX9OvLRF99DkrLX/view).
[295] Snowy Hydro, *Annual Report for the Year Ended 30 June 2019*, 40 (available at https://www.snowyhydro.com.au/wp-content/uploads/2020/04/Snowy-Hydro-Limited-Annual-report-for-the-year-ended-30-June-2019.pdf).
[296] Simon Birmingham (Minister for Finance) & Angus Taylor (Minister for Industry, Energy and Emissions Reduction), 'Snowy Hydro Limited: Statement of Expectations' (28 October 2021) 2 (available at https://www.snowyhydro.com.au/wp-content/uploads/2021/11/Statement-of-Expectations.pdf) ('Snowy Hydro Statement of Expectations').
[297] ANAO, *Snowy 2.0 Governance of Early Implementation* (2022) (n 284) [1.18].

A further $600 million was committed for the purposes of delivering the Hunter Power Project,[298] a hydrogen-compatible gas-fired power plant with capacity of 660 megawatts that was received final approval on 19 May 2021.[299] That project is now due for delivery in December 2024.[300]

As regards Snowy 2.0, it should be noted that the hydroelectric power industry provides fertile ground for problems and mismanagement, as it deals in a resource (ie, water) that is increasingly more precious, susceptible to climate change and allocated multilaterally for a variety of purposes.[301] However, notwithstanding these challenges that are inherent to the industry, the ANAO's audit of Snowy Hydro Ltd was effusive in its praise of the management thus far of Snowy 2.0. Three examples of good procurement practice that were highlighted are of interest: effective contract management; proper governance; and resolution of issues of delay and cost. In all instances, early-stage measures were singled out as particularly effective.

First, in describing the procurement objectives of Snowy Hydro Ltd, the performance audit stressed the importance of contract management in delivering projects according to these procurement principles.[302] Though the audit also considered the ongoing cost and performance review activities undertaken by Snowy Hydro in managing the contracts,[303] stress was placed on practices adopted by Snowy Hydro at the early stages of the project. Snowy Hydro began by articulating its position in relation to its own accountability to the Government regarding the delivery of Snowy 2.0 and in relation to the nature of the external contracting with which it would need to proceed to effect timely delivery.[304] As stated above, it ultimately opted for a single EPC contract, which was assessed to be the most attractive as regards overhead costs and exposure to risk.[305]

The audit approved of the clear articulation of deliverables and general obligations of the contracting parties in recitals as a means of facilitating contract management, in that clarity as to the objectives of the contract is a necessary prerequisite to ensuring that they be fulfilled.[306] The details of the terms pertaining to construction were based upon Employer Requirements first developed during the feasibility study in 2017, which were put to contractors and iterated over the course of negotiations prior to the entering of the contract.[307]

Secondly, as part of the audit's assessment of the adequacy of Snowy Hydro's governance frameworks, it emphasised the primary importance of transparent, systematic consideration and review processes at the early stages of Snowy 2.0, including by means of a feasibility study and published 'final investment decision'. The business case was then finally reconsidered prior the notice to proceed in 2021.[308]

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[298] 'Snowy Hydro Statement of Expectations' (2021) (n 296) 2.

[299] Snowy Hydro, *Annual Report for the Year Ended 30 June 2021*, 3 (available at https://www.snowyhydro.com.au/wp-content/uploads/2021/10/Snowy-Hydro-Limited-Annual-Report-for-the-Year-Ended-30-June-2021-1.pdf).

[300] Snowy Hydro, *Annual Report for the Year Ended 30 June 2023*, 51 (available at https://www.snowyhydro.com.au/wp-content/uploads/2023/10/Snowy-Hydro-Annual-Report-2023.pdf).

[301] See generally Paul R Wyrwoll & R Quentin Grafton, 'Reforming for Resilience: Delivering "Multipurpose Hydropower" under Water and Energy Risks' (2022) 38(6) *International Journal of Water Resources Development* 1032.

[302] ANAO, *Snowy 2.0 Governance of Early Implementation* (2022) (n 284) [2.40].

[303] See especially ibid [3.43]–[3.67].

[304] Ibid [3.4].

[305] Ibid [3.7].

[306] Ibid [3.9]–[3.10].

[307] Ibid [3.12].

[308] Ibid [2.11]–[2.27].

As with the Western Sydney Airport audit (see below), the Snowy Hydro audit analysed as part of its approval of the company's proper approach to corporate governance its early-stage implementation of risk assessment and management processes. In particular, it described the process by which 12 key risks were identified, and procedures established for the review and reporting to governance committees and government shareholder departments of those risks.[309] Cooperative risk allocation, specifically regarding unknown geological variables, during the finalisation of the project's contracts was also an important means of agreeing a workable contract price.[310]

Thirdly, Snowy Hydro established a clear procedure for the administration of contracts, including the review and processing of payment claims and variations, and appropriate recourse to dispute resolution processes. The audit analysed the 999 individual payment claims, with total value of $1.114 billion that had been made until the point of its publication, and placed emphasis on Snowy Hydro's documentation of reasons with evidence for approving of claims, and on its minimisation of delays.[311]

Finally, the performance audit discussed approaches adopted by Snowy Hydro to monitor the overall progress of the project.[312] Of particular note is the system established of regular reporting to the Board and shareholder ministries of the current status of the project vis-à-vis the original timeframe. Under this system, the cost to date ($2.07 billion as at the date of the audit) and the delays incurred (notably a 150-day extension that was allowed as a result of COVID-19) were assessed and deemed not to jeopardise the delivery on time and on budget of the project.[313]

What makes Snowy 2.0 an even more curious case study in light of the foregoing are the recent major setbacks that the project has suffered: increased resources costs and serious delay as a result of tunnelling problems, with a new estimated project cost in excess of $12 billion (up from approximately $2 billion).[314] While the recentness of these events precludes any detailed historical analysis or reappraisal of the ANAO's findings for the purposes of this paper, the Government's response to these events is instructive. Namely, it has opted completely to renegotiate the contract from fixed price to a target-cost contract model, with incentives for early and economical delivery and disincentives for the any further delays. Without expressing a view on the soundness of this decision in itself in this particular context, this decision appears to reflect the positive trends discussed above: the use of more modern and flexible contracting models; a willingness on the part of government to engage with contractors and renegotiate contracts; and proceeding with speed and efficiency in decision-making.

Western Sydney Airport

The Western Sydney Airport is a new international airport designed to supplement Sydney's existing Kingsford Smith Airport. The Commonwealth government laid out its objectives for the delivery of the airport in a Statement of Expectations sent on 13 September 2017, in which WSA Co Ltd ('WSA'), the Commonwealth Government business enterprise overseeing the construction of the

[309] Ibid [2.30]–[2.35]. A total of 120 individual risks were identified, which are reviewed on a six-weekly basis.
[310] Ibid [3.27].
[311] Ibid [3.47]–[3.51].
[312] Ibid '4. Monitoring and Reporting'.
[313] Ibid [4.10]–[4.13].
[314] See, eg, Tom Lowrey, 'Snowy Hydro Expansion Hits Reset Button as Costs Blow Out to $12 Billion', *ABC News*, 31 August 2023 (available at https://www.abc.net.au/news/2023-08-31/snowy-hydro-reset-project-to-cost-12-billion/102797650). See also Dennis Barnes, 'CEO Update: A Message from Snowy Hydro CEO Dennis Barnes' 62 *Snowy Hydro News* 3 (available at https://www.snowyhydro.com.au/news/newsletter/). The project has, however, increased in size and in project energy output.

airport, was instructed to deliver the airport by the end of 2026.[315] The airport is to create 28,000 direct and indirect jobs by the early 2030s; and the Government has committed up to $5.3 billion for the construction of the airport.[316] Prior to the announcement of the first successful tenderer for main airport constructions in August 2019 (for major earthworks, which were completed in March 2023),[317] over 189 contracts valuing $599 million in total had been awarded for preliminary activities.[318] The total equity contributed by the Australian Government to Western Sydney Airport has been, as at the end of the 2023 financial year, $3.6 billion.[319]

The development of the Western Sydney Airport has also necessitated the investment in adjacent infrastructure, such as road and rail infrastructure in the new airport precinct.[320] To this, the Commonwealth and NSW governments have committed approximately $15 billion,[321] including in a railway line to the airport to which the Australian government has committed up to $5.25 billion.[322]

The ANAO's performance audit of WSA's procurement activities revealed a number of deficiencies in the procurement process. In particular, the Auditor-General drew attention to the delay in establishing procurement guidelines, with a draft procurement policy and procurement manual presented to its Board 15 months after WSA's establishment.[323] By that point, 124 contracts for 'corporate and enabling activities', with value of $528.7 million, had already commenced.[324] The Auditor-General also drew attention to the high procurement threshold for non-construction services, at $5 million,[325] far higher than the CPR threshold of $400,000 for prescribed corporate Government entities.[326] Even once WSA ultimately established a procurement framework, there was evidence that it had not adequately complied with that framework, including by failing to maintain adequate documentation.[327]

However, the performance audit investigated and placed emphasis on the pre-procurement assessment of risk,[328] with evidence in 81% of procurements of informed negotiating to help keep the value of contracts commensurate with the scale of the procurement, and ultimately to keep to the Government envelope of $5.3 billion.[329] Among the activities identified in the report as evidencing

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[315] Mathias Cormann & Paul Fletcher, 'Statement of Expectations for WSA Co Ltd' (13 September 2017) 1 (available at https://www.westernsydneyairport.gov.au/sites/default/files/WSACo_Statement_of_Expectations.pdf) ('WSA Statement of Expectations').
[316] Ibid 1–2.
[317] See https://westernsydney.com.au/projects/major-earthworks.
[318] ANAO, *Western Sydney Airport Procurement Activities: WSA Co Limited* (Auditor-General Report No 16 of 2019–20, Performance Audit, 4 December 2019) 14–15 [1.6] (available at https://www.anao.gov.au/work/performance-audit/western-sydney-airport-procurement-activities).
[319] Western Sydney Airport, *Annual Report 2022–23*, 40 (available at https://westernsydney.com.au/about/documents-reports).
[320] See further: Denny-Smith et al (2021) (n 201) 2, citing A Raiden et al, *Social Value in Construction* (Routledge, 2019).
[321] Western Sydney Airport, *Corporate Plan 2022–23*, 13 (available at https://westernsydney.com.au/about/documents-reports).
[322] See further: https://www.westernsydneyairport.gov.au/transport-infrastructure/rail.
[323] ANAO, *WSA Procurement Activities* (2019) (n 318) [2.8].
[324] Ibid [2.11]
[325] Ibid [2.7]–[2.9]. The threshold was subsequently reduced to remain consistent with the CPRs.
[326] *Commonwealth Procurement Rules* (13 June 2023) r 9.7(b) (available at https://www.legislation.gov.au/Details/F2023L00766).
[327] ANAO, *WSA Procurement Activities* (2019) (n 318) [2.30]–[2.53].
[328] See similarly Mohammed Berawi et al, 'Prioritizing Airport Development Plan to Optimize Financial Feasibility' (2018) 22(3) *Aviation* 115, 117.
[329] ANAO, *WSA Procurement Activities* (2019) (n 318) [4.10].

good practice included the engagement of a consultant by the procuring company to review the methodologies put forward by tenderers, to assess their viability in the context of the project, as well as the involvement of a Price Review Team, in order to assess the total projected costs associated with each tender.[330]

In summary, in the circumstances where public servants have the scrutiny of their Minister, the Cabinet, Performance Audits by the Auditor-General and, in the case of NSW, Health Checks by INSW, public servants are encouraged to make decisions in relation to the settlement of disputes. Where those have been the subject of an external process, be it expert determination (binding or non-binding), adjudication, a Dispute Board Advisory Opinion or Decision — which will be discussed below — those decision makers are encouraged to resolve Issues and Disputes at a much earlier point in time.

ii. Procurement Policies and Guidelines

Commonwealth Procurement Guidelines

Procurement by Commonwealth entities is governed by the Commonwealth Procurement Rules (CPRs), the latest edition of which was released by the Minister for Finance on 13 June 2023.[331] Together with other published guidelines, such as those in the Contract Management Guide,[332] the CPRs form part of the Government's Procurement Policy Framework.

As was summarised in the foreword to the CPRs, '[a]chieving value for money is the core rule of the Commonwealth Procurement Rules as it is critical in ensuring that public resources are used in the most efficient, effective, ethical and economic manner'. The CPRs are said not only to contemplate price, but also to require officials to consider broader economic and social benefits as well as non-financial costs. The Rules that are pertinent to 'Value for Money' is split into two categories: 'considering value for money' and 'achieving value for money'. The former section underscores the need for clarity as to the purpose of the procurement, as well as the need to take into account a broad range of considerations.[333] The latter section refers the remainder of the rules, and describes methods that are designed to maintain efficient and effective control over procurements:

1) Competition: the CPRs prescribe practices of non-discrimination, and also aim to encourage the involvement of SMEs in the procurements of non-corporate Government entities, with the Government committing to sourcing at least 20% of procurements by value from SMEs.[334]

   Limited tender and open tender contracts comprise the majority of procurement methods used.[335] The use of an open tender approach to procurement, involving an open approach to

[330] Ibid [4.12].
[331] See https://www.legislation.gov.au/Details/F2023L00766. This latest version of the CPRs differs from the previous version released on 1 July 2022 only in that it makes mention of the High Speed Rail Authority.
[332] See Department of Finance, *Australian Government Contract Management Guide* (December 2020) (available at https://www.finance.gov.au/sites/default/files/2020-12/Contract%20Management%20Guide%20December%202020%20-%20Master.pdf).
[333] Namely 'stakeholder input; the scale and scope of the business requirement; the relevant entity's resourcing and budget; obligations and opportunities under other existing arrangements; relevant Commonwealth policies; and the market's capacity to competitively respond to a procurement': *Commonwealth Procurement Rules* (2023) (n 326) r 4.2.
[334] *Commonwealth Procurement Rules* (2023) (n 326) r 5.
[335] ANAO, *Australian Government Procurement Contract Reporting: 2022 Update* (Auditor-General Report No 11 of 2022–23, Information Report, 2 February 2023) 60 [5.4] (available at

market and inviting submissions,[336] is presented in the CPRs as the default procurement mechanism, and forms part of the CPRs' prioritisation of competition as an effective means of achieving value for money.[337] By way of example, a performance audit on Snowy 2.0 approved of its efforts at maintaining effective competition through its adoption of open tender principles and its maintenance of competitive tension all the way until the contract was ultimately awarded.[338] Similarly, the Department of Finance reported that WSA had split the $5.3 billion of procured works for the Western Sydney Airport into multiple smaller packages in order to facilitate competition.[339] For procurements above the procurement threshold,[340] limited tender, which involves approaching particular potential suppliers and inviting them to make submissions,[341] can generally only be employed after an open approach to market was unsuccessful.[342]

While limited tender contracts are still used in approximately the same amount of contracts each year, the use of open tendering has increased.[343] Additionally, the proportion of the use of open and limited tendering has shifted, from 40% and 53% respectively in 2012–13 to 55% and 45% respectively in 2021–22.[344] The increase in the use of open tendering has coincided with the discontinuance of the so-called 'prequalified tender' procurement method, which reflected a hybrid method between open and limited tendering.[345]

2) 'Efficient, Effective, Economical and Ethical': This string of adjectives, the CPR's elaboration upon 'proper use and management of public resources',[346] broadly provides for a code by which procurement officials are to conduct themselves.[347] The CPRs contain particular provisions for ethical procurement, including restrictions on tenderers it may engage, as well as providing for judicial review of activities of procuring entities.

3) Transparency: Officials to whom the CPRs apply are obliged to keep records, report contracts, approaches to market and a short-term procurement plan on AusTender, and carefully balance the interest in maintaining confidentiality with that in public disclosure. Officials are also required, when necessary for the procurement of more major services, to make reasonable enquiries to determine the compliance of tenderers with the prescribed standards.[348]

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https://www.anao.gov.au/work/information/australian-government-procurement-contract-reporting-2022-update).

[336] *Commonwealth Procurement Rules* (2023) (n 326) r 9.8.

[337] Ibid r 4.4(a).

[338] ANAO, *Snowy 2.0 Governance of Early Implementation* (2022) (n 284) [3.34], [3.40].

[339] House of Representatives Standing Committee (2022) (n 197) 30 [3.29].

[340] For construction services, the procurement threshold is $7.5 million: *Commonwealth Procurement Rules* (13 June 2023) r 9.7(c) (available at https://www.legislation.gov.au/Details/F2023L00766).

[341] *Commonwealth Procurement Rules* (2023) (n 326) r 9.8.

[342] Ibid r 10.3(a). There are, however, exceptions: see r 10.2; Appendix A. See also ANAO, *Australian Government Procurement Contract Reporting* (2023) (n 335) 15 [2.11].

[343] ANAO, *Australian Government Procurement Contract Reporting* (2023) (n 335) 61 [5.5].

[344] Ibid 8 [3].

[345] Ibid 61 [5.5].

[346] See *Commonwealth Procurement Rules* (2023) (n 326) r 6.1.

[347] Ibid r 6.

[348] Ibid r 7.

4) Procurement Risk: Entities must put in place a system for risk identification and management, and are presumptively to allocate risks according to the ability of the parties to bear those risks.[349]

The CPRs are issued pursuant to Section 105B(1) of the *Public Governance, Performance and Accountability Act 2013* (Cth) ('*PGPA Act*'), and are stipulated to apply to officials from: non-corporate Commonwealth entities;[350] and corporate Commonwealth entities that are prescribed under section 30 of the *Public Governance, Performance and Accountability Rule 2014* (Cth).[351] Additionally, companies controlled by the Commonwealth (Commonwealth companies as defined in Section 89(1) of the *PGPA Act*) may be prescribed by the Minister for Finance to be subject to the CPRs, however none have as of yet been so prescribed.[352] Currently, of the 191 Commonwealth entities and companies in operation, 126 are subject to the CPRs. To officials from those entities, the application of the CPRs is mandatory.[353] A full list of Commonwealth entities, including those to whose officials the CPRs apply, can be found at the Department of Finance's website.[354]

WSA and Snowy Hydro Ltd are examples of Commonwealth-owned entities to whom the CPRs do not apply. Both, however, as wholly Commonwealth-owned companies, must keep the relevant shareholder ministers informed of the company activities, pursuant to Section 19(1)(a) of the *PGPA Act*. WSA is required to provide quarterly updates to its Shareholder Departments, the Department of Finance and the Department of Infrastructure, Transport, Regional Development, Communication and the Arts,[355] reporting against Key Performance Indicators.[356] WSA must also notify Shareholder Ministers of any proposed tenders or contracts with a value in excess of $50 million.[357] Similarly, Snowy Hydro Ltd is required to report regularly to its shareholder departments.[358]

Nevertheless, WSA still applies principles from the CPRs in its own procurement guidelines, such as prioritising value for money,[359] as well as other such requirements as were established in the initial Statement of Expectations.[360] Likewise, though Snowy Hydro Limited is not bound by the CPRs, its Statement of Expectations requires that its procurement processes be 'open, transparent, competitive and reflect value for money'.[361] Snowy 2.0's own procurement framework 'has been designed in accordance with best practice and high standards of probity', which the CPRs serve to reflect.[362]

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[349] Ibid r 8.
[350] Commonwealth entities are defined under Section 10 of the *PGPA Act* to include: Departments of State; Parliamentary Departments; listed entities; body corporates established by a law of the Commonwealth; and body corporates established under a law of the Commonwealth (other than Commonwealth companies) and are prescribed to be Commonwealth entities.
[351] *Commonwealth Procurement Rules* (2023) (n 326) r 2.2.
[352] *PGPA Act* s 105B(1)(c).
[353] *Commonwealth Procurement Rules* (2023) (n 326) r 3.1.
[354] See Department of Finance, 'Flipchart of PGPA Act Commonwealth Entities and Corporations (191)' (1 November 2023) (available at https://www.finance.gov.au/sites/default/files/2023-10/Flipchart%201%20November%202023%20-%20FINAL.pdf).
[355] Initially the Department for Infrastructure and Regional Development.
[356] 'WSA Statement of Expectations' (2017) (n 315) 3.
[357] See ANAO, *WSA Procurement Activities* (2019) (n 318) [4.24].
[358] See ANAO, *Snowy 2.0 Governance of Early Implementation* (2022) (n 284) [4.27]–[4.28].
[359] Western Sydney Airport, *Procurement Guidance* (September 2019) [1.2] (available at https://www.westernsydney.com.au/about/documents-reports).
[360] 'WSA Statement of Expectations' (2017) (n 315) 2.
[361] 'Snowy Hydro Statement of Expectations' (2021) (n 296) 2.
[362] Snowy Hydro, *FID: S02 Procurement* (2019) 6–7 [1.4] (available from file:///C:/Users/PeterTaurian/Downloads/S02%20Procurement.pdf).

Both Statements of Expectations emphasise the primary importance of delivering on time and on budget the final project.[363]

State Procurement Guidelines

Informing the NSW Government's policy on procurement is its commitment to a 'ten point action plan', which describes principles by which it intends to facilitate efficient construction procurement in future.[364] As part of its efforts in achieving these goals, the NSW Government has released a series of reports and guidelines to direct public infrastructure expenditure and management.[365] Notable examples include the following:

1) In May 2021, Infrastructure NSW published an update to its Oversight Framework, which establish principles necessary for proper and responsible governance, such as relate to delegation and performance evaluation.[366]

2) In June 2021, Infrastructure NSW issued its Framework for Establishing Effective Project Procurement to provide best practice guidance for the achievement of the NSW Government's ten point plan.[367] The Framework prescribes an '*if not, why not*' approach, requiring explanations to be given for deviations from default practices.[368] The Framework notably encourages proactivity in the early pre-construction phases, including through early industry engagement, early contractor involvement (ECI) and early works packages to de-risk ultimate delivery.[369] It also prescribes as the default practice the use of open book or target costs which given appropriate allowance for identifiable risks.[370]

3) On 26 April 2022, Infrastructure NSW published its Cost Control Framework, a comprehensive policy that seeks to instil a 'Cost Control Culture' in public infrastructure procurement processes, in order to encourage regular and rigorous cost and risk assessments. The framework also requires that cost estimates and information as to the overall status of projects be reported regularly to Infrastructure NSW.[371]

4) In May 2022, the NSW Government published Commercial Principles for Infrastructure Projects, which provide information for the consideration of NSW Government entities prior to entering into contracts. In addition to providing more generic advice concerning contractual

[363] 'WSA Statement of Expectations' (2017) (n 315) 1; 'Snowy Hydro Statement of Expectations' (2021) (n 296) 2.
[364] NSW Government, *NSW Government Action Plan: A Ten Point Commitment to the Construction Sector* (June 2018) 5 ('4. Develop and Promote a Transparent Pipeline of Projects') (available at https://www.infrastructure.nsw.gov.au/media/1649/10-point-commitment-to-the-construction-industry-final-002.pdf).
[365] For a summary of such recent reports and guidelines, see Infrastructure NSW, *2022–23 State Infrastructure Plan: A 5-Year Plan for Major Infrastructure for NSW* (June 2022) 8 (available at https://www.insw.com/media/3703/infr9969-state-infrastructure-plan-v1.pdf).
[366] Infrastructure NSW, *Oversight Framework for the NSW Infrastructure Program* (May 2021) (available at https://www.infrastructure.nsw.gov.au/media/2932/oversight-framework_final.pdf).
[367] Infrastructure NSW, *Framework for Establishing Effective Project Procurement for the NSW Infrastructure Program* (June 2021) (available at https://www.infrastructure.nsw.gov.au/media/2944/procurement-framework_3-june-21_final.pdf).
[368] Ibid 3.
[369] Ibid 6–10.
[370] Ibid 11–13.
[371] Infrastructure NSW, *Cost Control Framework for the Infrastructure Program* (26 April 2022) 7–9 (available at https://www.infrastructure.nsw.gov.au/media/3533/cost-control-framework-approved.pdf).

obligations, these principles focus on improving the effectiveness of contracts in achieving their objectives and minimising disputes, such as by encouraging due diligence in the pre-contractual ascertaining of information and negotiations concerning the allocation of risks.[372] They also explicitly refer to the need to resolve disputes in a timely fashion, by fostering cooperation and negotiation as opposed to relying purely on the contract's adversarial dispute resolution mechanisms. Practices that are encouraged include maintaining open dialogue between the parties, and escalating disputes to senior parties through responsible governance structures so as to enable project teams to continue to progress the project. These principles require that 'the parties should work together towards a best-for-project outcome in all instances', and parties should consider prioritising saving costs or time in resolving disputes depending upon which is more urgent for the delivery of the project.

The principles notably recommend a chain by which disputes should be escalated, beginning first with good-faith and timely negotiation processes, then settlement or part settlement of claims, and then rapid escalation of claims to be resolved, whether with or without binding determination, by dispute avoidance boards, expert determination or mediation, as provided for in the contracted. Arbitration and litigation are expressly stated to be 'avenues of last resort'.

5) On 9 August 2022, the Department of Premier and Cabinet issued guiding principles for infrastructure projects,[373] which, in addition to providing detailed standard timelines for projects from their inception to their delivery, clearly evidence a policy of early and open communication before commencing construction, so as to avoid delays and disputes in future.[374]

The NSW Government Procurement Policy Framework consolidates the above and other guiding principles into a single Framework which illustrates best practice in public procurement.[375] Its main objectives are, in a similar vein to the CPRs, achieving value for money, and encouraging fair and open competition, easy-to-do business, innovation, and economic, social and sustainability outcomes.[376] Like the CPRs, it also describes a process for ensuring oversight by and reporting to the NSW Government.[377] However, the Framework goes beyond the CPRs in that it prescribes in detail also its 'Plan, Source, Manage' approach to procurement, with individual requirements reflecting the entire procurement process from start to finish.[378]

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[372] NSW Government, *Commercial Guidelines for Infrastructure Projects* (May 2022) (available at https://www.infrastructure.nsw.gov.au/media/3485/commercial-guidelines.pdf).

[373] Which supersede the previous memorandum: NSW Government (Premier and Cabinet), *Timely Information on Infrastructure Projects and Transactions within the Non-Government Sector* (Department of Premier and Cabinet Circular, C2020-22, 17 December 2020, reviewed 23 March 2023) (available at https://arp.nsw.gov.au/c2020-22-timely-information-on-infrastructure-projects-and-transactions-with-the-non-government-sector/).

[374] See NSW Government (Premier and Cabinet), *Information on Infrastructure Projects* (Premier's Memorandum, M2022-06, 9 August 2022, reviewed 9 March 2023) (available at https://arp.nsw.gov.au/m2022-06-information-on-infrastructure-projects/).

[375] NSW Government, *Procurement Policy Framework* (April 2022) (available at https://info.buy.nsw.gov.au/__data/assets/pdf_file/0020/1065503/Procurement-Policy-Framework-1.9-April-2022-Full-V1.pdf).

[376] Ibid 8–38.

[377] Ibid 40–139.

[378] Ibid 141–50.

iii. Model Litigant Policies

Both the Commonwealth Government and State Governments (and government entities) are required to act as a model litigant when resolving disputes. The Commonwealth Model Litigant Policy is contained in Appendix B of the *Legal Services Directions 2017* (Cth), which are issued by the Attorney-General with general application to Commonwealth legal work.[379] The States' Model Litigant Policies are contained in memoranda issued by Government Departments, including NSW's Department of Premier and Cabinet,[380] and Queensland's Department of Justice and Attorney-General.[381]

The material provisions of all the Model Litigant Policies are as follows:

1) Acting honestly and fairly: Government entities must deal with claims quickly and without unnecessary delays; make early assessments of success in potential proceedings; pay claims for which it understands itself to be liable, in part or in full as appropriate; not argue untenable points or pursue appeals without reasonable prospects of success; consider raising confidentiality on a case-by-case basis; and minimise the time and expense of litigation.[382]

2) Alternative Dispute Resolution: Government entities may only make recourse to litigation before the courts after all forms of alternative dispute resolution have been considered and earnestly attempted.[383] This is an essential, arguably the most essential, aspect of the policy, however produces the ironic result that being a model litigant principally involves avoiding litigation. It is to be considered whether the policy exerts contradicting effects on commercial parties, insofar as it simultaneously discourages litigation but also makes the Commonwealth a more attractive opposing litigant.

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[379] *Judiciary Act 1903* (Cth) s 55ZF (available at https://www.legislation.gov.au/Details/C2022C00081).

[380] Department of Premier and Cabinet (NSW), *Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse* (Premier's Memorandum, M2016-03, issued 29 June 2016) (available at https://arp.nsw.gov.au/m2016-03-model-litigant-policy-civil-litigation-and-guiding-principles-civil-claims-child-abuse). This policy is explicitly said not to supersede other, previous policies, which, in their current form, are as follows: Department of Premier and Cabinet (NSW), *Litigation Involving Government Authorities* (Premier's Memorandum, M1997-26, issued 8 October 1997, reviewed 31 December 2014) (available at https://arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities); Department of Premier and Cabinet (NSW), *NSW Government Core Legal Work Guidelines* (Premier's Memorandum, M2016-04, issued 1 July 2016) (available at https://arp.nsw.gov.au/m2016-04-nsw-government-core-legal-work-guidelines).

[381] See Department of Justice and Attorney-General (Qld), *Model Litigant Guidelines* (revised as at 4 October 2010) (available at https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/model-litigant-principles); Department of Justice and Attorney-General (Qld), *Significant Litigation Directions* (issued 16 April 2012) (available at https://www.justice.qld.gov.au/__data/assets/pdf_file/0007/164680/significant-litigation-directions.pdf); Department of Justice and Attorney-General (Qld), *Principles and Categories of Tied Legal Work for Queensland Government Agencies* (last updated 14 March 2023, available at https://www.justice.qld.gov.au/justice-services/legal-services-coordination-unit/legal-service-directions-and-guidelines/tied-work-guidelines).

[382] *Legal Services Directions 2017* (Cth) Appendix B para 2 (available at https://www.legislation.gov.au/Details/F2018C00409); Department of Premier and Cabinet (NSW), *Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse* (2016) (n 380) para 3.2; Department of Justice and Attorney-General (Qld), *Model Litigant Guidelines* (2010) (n 381) paras 1–2.

[383] *Legal Services Directions 2017* (Cth) Appendix B paras 5.1–5.2; Department of Premier and Cabinet (NSW), *Model Litigant Policy for Civil Litigation and Guiding Principles for Civil Claims for Child Abuse* (2016) (n 380) para 3.2(d); Department of Premier and Cabinet (NSW), *Litigation Involving Government Authorities* (2014) (n 380) paras 3.1–3.6 (available at https://arp.nsw.gov.au/m1997-26-litigation-involving-government-authorities); Department of Justice and Attorney-General (Qld), *Model Litigant Guidelines* (2010) (n 381) paras 1, 3.

A key area of academic and jurisprudential interest concerning model litigant policies in Australia has been their enforceability. Generally speaking, the States' model litigant policies are descriptive only of Government policy, and do not have an attendant framework within which their enforcement may be sought.[384] The Commonwealth model litigant policy, however, is explicitly said to be 'not enforceable except by, or upon the application of, the Attorney-General'.[385] The Attorney-General is empowered to impose 'sanctions',[386] however the possible sanctions that may be imposed are not enumerated in the directions, nor are they clearly listed in the Office of Legal Services Coordination's (OLSC) compliance framework to which the notes refer,[387] but are left rather for each individual contract to determine.[388] Further, although there are reporting obligations imposed on chief executives of Government entities, regarding their compliance or non-compliance with the *Legal Services Directions*,[389] the enforcement is these policies is largely a matter of self-monitoring on the part of the Government entity.[390] Of the 178 notifications reported to the OLSC in 2021–22 indicating possible breach, 76 were assessed by the OLSC as in fact evincing non-compliance,[391] a decrease from the 94 of 169 notifications reported in 2020–21.[392] Of the 100 total notifications regarding a breach of the model litigant obligation, 70 were reassessed by the OLSC as compliant.[393]

The Commonwealth's model litigant policy also may not be raised in any 'proceeding', whether before a court or any other body, 'except by, or on behalf of, the Commonwealth'.[394] There is, therefore, no direct recourse whereby aggrieved parties might refer to the Commonwealth's breaches of its directions. However, there exists a concurrent obligation at common law for the Australian government to subscribe to a 'standard of fair play'[395] such as makes it a model litigant.[396] This common law obligation may even be informed by the *Legal Services Directions*,[397] such that it is to be considered whether the common law duty effectively overrides the *Judiciary Act*'s own statement of the directions' unenforceability. This is an unsatisfactory result insofar as it produces ambiguity in the relationship between executive, legislative and judiciary branches of government. The obligation may even go further.[398] The common law obligation, however, recognises that the model litigant principles serve

[384] See Gabrielle Appleby, 'The Government as Litigant' (2014) 37(1) *University of New South Wales Law Journal* 94, 109.
[385] *Judiciary Act 1903* (Cth) s 55ZG(2).
[386] *Legal Services Directions 2017* (Cth) sch 1 para 14.1.
[387] See OLSC, *Legal Services Direction 2017: Compliance Framework* (2 July 2018) (available at https://www.ag.gov.au/legal-system/publications/office-legal-services-coordination-compliance-framework).
[388] *Legal Services Directions 2017* (Cth) sch 1 para 14.2.
[389] See *Legal Services Directions 2017* (Cth) sch 1 paras 11.1(b), (d), 11.2.
[390] See Appleby (2014) (n 384) 112.
[391] OLSC, 'Statistics on Compliance with the *Legal Services Directions 2017*: 2021–22 Data' (published 16 June 2023) (available at https://www.ag.gov.au/legal-system/publications/olsc-compliance-statistics-2021-22).
[392] OLSC, 'Statistics on Compliance with the *Legal Services Directions 2017*: 2020–21 Data' (21 April 2022) (available at https://www.ag.gov.au/legal-system/publications/olsc-compliance-statistics-2020-21-financial-year).
[393] OLSC, '2021–22 Data' (2023) (n 391).
[394] *Judiciary Act 1903* (Cth) s 55ZG(3).
[395] *Melbourne Steamship Co Ltd v Moorehead* (1912) 15 CLR 333, 342 (Griffith CJ).
[396] See, eg, Eugene Wheelahan, 'Model Litigant Obligations: What Are They and How Are They Enforced? (Federal Court Ethics Seminar Series, 15 March 2016) [9]; Philip Salem, 'The Government's Model Litigant Policy: Ethical Issues' [2015] (June) *Inhouse Counsel* 52, 52; Appleby (2014) (n 384) 95.
[397] See *Australian Securities and Investments Commission v Rich* (2009) 236 FLR 1, 116 [527] (Austin J), cited in Wheelahan (2016) (n 396) [21].
[398] See Wheelahan (2016) (n 396) [28].

primarily to provide guidance to Government officers,[399] and are not designed to create additional rights on the part of other litigants.[400]

In a similar vein to model litigant policies is the (as yet speculative and undefined) notion of the 'model client'. The Commonwealth was called upon by Infrastructure Australia to act as a model client in respect of early-stage open collaboration in construction procurements.[401] The possibility of implementing such a model client policy was discussed in the 2022 report of the Commonwealth House of Representatives Standing Committee on Infrastructure, Transport and Cities.[402]

iv. Further Advancements

As highlighted above, government reforms to procurement policies have been forthcoming in recent years to respond to the increasing demand for infrastructure in Australia. Expediting the need for a change in approach have been a number of recently occurring phenomena, such as the exponential rise in the occurrence of megaprojects and the incidence of COVID-19.

Megaprojects

Regarding the delivery of megaprojects, Infrastructure NSW has published certain specific recommendations, having noted the inherent difficulties of managing such projects, which are 49% more likely to face budget and timing challenges than projects under $1 billion.[403] Accordingly, its 2022 Strategy plan, as part of its emphasis on the central importance of timely project delivery, recommended supplementing megaprojects with medium-sized or small investments or projects that could be delivered in stages, and even delaying the procurement and commencement of certain megaprojects until existing complex projects reached completion.[404] The approach of unbundling megaprojects into smaller packages, for which SMEs may be contracted, has also been endorsed by the Commonwealth House of Representatives' Standing Committee on Infrastructure, Transport and Cities.[405]

The 2021 Premier's Memorandum for the Procurement of Large, Complex Infrastructure Projects serves to alleviate the challenges of ensuring delivery specifically of such projects by establishing 'Default Procurement Practices'. Such practices are split between: the pre-construction phrase, which encourage ECI and the procurement of early works; the procurement approach, which encourage appropriate risk allocation, early engagement of the contractor with the contract terms, performance incentives for timely delivery and open book cost mechanisms where appropriate; and cost- and time-saving mechanisms, such as the use of flexible and realistic timeframes, efficient dealing with tenders, and increased state involvement in the drafting of plans for which tenderers may make submissions.[406]

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[399] *Tran v Minister for Home Affairs* [2019] FCA 1126, [34] (Derrington J).
[400] *Malone v Queensland* [2020] FCA 1188, [74] (O'Bryan J).
[401] Infrastructure Australia, *Reforms to Meet Australia's Future Infrastructure Needs* (2021) (n 202) 274.
[402] House of Representatives Standing Committee (2022) (n 197) 78–9 [5.19]–[5.25].
[403] Infrastructure NSW, *2022–23 State Infrastructure Plan* (2022) (n 365) 7.
[404] Infrastructure NSW, *Staying Ahead* (2022) (n 203) 9.
[405] House of Representatives Standing Committee (2022) (n 197) 112–14 [6.40]–[6.49].
[406] See NSW Government (Premier and Cabinet), *Procurement for Large, Complex Infrastructure Projects* (Premier's Memorandum, M2021-10, 24 June 2021, reviewed 25 March 2023) (available at https://arp.nsw.gov.au/m2021-10-procurement-for-large-complex-infrastructure-projects/#:~:text=The%20purpose%20of%20this%20memorandum,for%20Establishing%20Effective%20Project%20Procurement).

Infrastructure NSW has since reported an increase of 13% between 2021 and 2022 of projects between $50 and $100 million, reflecting a shift towards locally targeted investments.[407]

COVID-19

Due in part to the impacts of COVID-19, and the influx in expenditure on construction infrastructure that resulted, Infrastructure NSW commenced a Strategic Infrastructure Review, whereby an independent panel of experts assessed the conformity of ongoing projects under the current pipeline with best practice in public procurement,[408] leading to a reprioritisation of Government infrastructure spending in the 2023–24 Budget.[409] Concurrently to this review of the overall pipeline, there has been conducted a review of the Sydney Metro program, which the government has preliminarily estimated to have overrun its initial cost estimates by $9 billion for the City and Southwest line and $12 billion for the West line, in addition to significant delays to the delivery of the latter.[410] The review has released its Interim Report.[411]

In 2022, Infrastructure NSW published two sets of guidelines in response to COVID-19:

1) In March 2022, Infrastructure NSW published guidelines specifically for managing supply chain disruption and delay caused by COVID-19, which reflect the increasing facility with which it is possible to quantify pandemic-caused delays and mitigation measures and reflect them in contract prices. In addition to reasserting the importance of collaboration and other such general principles, the guidelines require contractors to provide a COVID-19 Management Plan with tender submissions to outline procedures that it has in place to mitigate the effects of COVID-19 on project delivery.[412]

2) In September 2022, Infrastructure NSW published principles specifically applicable to resolve issues concerning escalation risk in infrastructure projects which, although historically borne by contractors, have been problematised by volatile market factors caused by COVID-19 and the conflict in Ukraine. The principles underscore the importance of procedures that had already been understood to be good practice, such as early engagement and open communication with contractors, especially with a view to establishing pre-agreed variations in contracts in the event of delaying circumstances. They also emphasise the need to be flexible in terms of the project's commencement and overall timeframe, as well as in risk allocation, in which regard the guidelines recommend a 'pain share, gain share' arrangement.[413]

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[407] Infrastructure NSW, *2022–23 State Infrastructure Plan* (2022) (n 365) 12.
[408] See Infrastructure NSW, *Terms of Reference: Strategic Infrastructure Review* (5 May 2023) (available at https://www.insw.com/media/3930/strategic-infrastructure-review-tor.pdf).
[409] NSW Treasury, *NSW Budget 2023–24: Budget Statement* (n 204) 3-8.
[410] NSW Government, 'Sydney Metro Review' (Media Release, 13 April 2023) (available at https://www.nsw.gov.au/media-releases/sydney-metro-review).
[411] See Mike Mrdak & Amanda Yeates, *Sydney Metro Independent Review: Interim Report Summary*, 23 June 2023 (available at https://www.transport.nsw.gov.au/system/files/media/documents/2023/Sydney-Metro-Independent-Review_Interim-Report_Public-Summary.pdf).
[412] Infrastructure NSW, *COVID-19 Commercial Guidelines for Construction Projects* (March 2022) (available at https://www.infrastructure.nsw.gov.au/media/3394/covid-19-commercial-guidelines-march-2022.pdf).
[413] Infrastructure NSW, *Commercial Principles on Escalation Risks for Infrastructure Projects* (1 September 2022) (available at https://www.infrastructure.nsw.gov.au/media/3656/approved-commercial-principles-for-escalation-august-2022.pdf).

Policy Reforms

Further policy reforms are on the horizon. The NSW Government is committed to achieving a 'ten point action plan', which serves, inter alia, to improve the efficiency of procurement processes in construction activities, and to facilitate increased cooperation between the public and private sectors.[414] The first three of the ten points emphasise the need for collaboration in the procurement and management of construction projects, citing such strategies as Early Contractor Involvement (ECI), alliancing, and the publication and adoption of standard guidelines and contracts in partnership with industry.[415] The plan highlights by way of example the successful delivery, on time and on budget, of the International Convention Centre in Sydney, a $1.5 billion project which now forms part of a $3.4 billion refurbishment of Darling Square.[416] Delivery of this action plan is the responsibility of the Construction Leadership Group (CLG), which meets monthly and regularly engages with industry members.[417]

The following Section focuses on a particular innovation in the delivery of Australian infrastructure works, being the inclusion of Dispute Avoidance Boards (DABs) in a number of major projects in Australia since 2003, as a means of avoiding the possibility of disruptive disputes prior to their crystallisation.[418]

D. Dispute Avoidance Boards for Project Facilitation

Dispute Boards were originally conceived within the construction industry in the United States. In the 1950s, competition for public construction contracts in the US became intense, and contractors were forced to accept lower profit margins. At the same time, construction projects became larger, more expensive and more complex with many parties performing different aspects of the project. Other non-technical demands emerged such as environmental regulations, governmental and socio-economic requirements and public interest group pressures. The net result of these factors, coupled with the financial instability of many contractors with tight margins, required contracting parties to purse all available means to protect their commercial positions. The trend to resolve disputes by formal litigation increased, relationships became more adversarial as the construction industry sought more cost-effective and practical solutions.

Although arbitration became popular because it was less expensive and faster than litigation, it too became costly, time consuming and adversarial. The ensuing movement away from litigation and arbitration led to alternative dispute resolution (ADR) processes such as mediation, and subsequently to the development of the Dispute Board concept.

In 1972, the US National Committee on Tunneling Technology sponsored a study of contracting practices throughout the world, to develop recommendations for improved contracting methods in the United States. The study concluded that the deleterious effect of disputes and litigation upon the efficiency of the construction process was a major cause of rapidly escalating construction costs. The results of the study represented in a paper called 'Better Contracting for Underground Construction',

[414] *NSW Government Action Plan* (2018) (n 367) 5 ('4. Develop and Promote a Transparent Pipeline of Projects').
[415] Ibid 3–5.
[416] See ICC Sydney, *2017 Annual Performance Review*, 7 (available at https://www.iccsydney.com/iccs.mvc/media/iccs/documents/2017-iccsydney-annual-performance-review.pdf).
[417] See https://www.insw.com/industry/construction-leadership-group/.
[418] See generally P Gerber, 'Alliances and Dispute Review Boards: Best Friends or Worst Enemies?' (2012) 10(1) *Australian Journal of Civil Engineering*, 57, 57–8; Charrett (2021) (n 222) 339–50.

published in 1974, and the Dispute Board concept was born.[419] In 1975, the Dispute Board process was first used during construction of the second bore of the Eisenhower Tunnel for Inter State 70 in Colorado. That Dispute Board process was an overwhelming success. The Dispute Board dealt with significant disputes, yet the Owner-Contractor relationship remained cordial throughout construction, and all parties were satisfied with the final time and cost outcomes for the project. Other successful Dispute Boards soon followed, and the US construction industry began to recognise the unique features of the Dispute Board process for managing and resolving disputes. The American Society of Civil Engineers promoted the Dispute Board concept in the first edition of its manual called 'Avoiding and Resolving Disputes During Construction' in 1989.

As the success of the Dispute Board process became obvious, the use of Dispute Boards spread worldwide. The first Dispute Board outside the US occurred in Honduras with the construction of the El Cajon Dam and Hydroelectric Plant in 1980. Other Dispute Boards soon followed internationally, encouraged by the support of governments, professional engineering associations and project-funding institutions such as the World Bank. In the 1990s, several large international projects successfully utilized Dispute Boards, including the Channel Tunnel Project (between the UK and France), the new Hong Kong International Airport and the Ertan Hydroelectric Project in China.

In January 1995, the World Bank published a new addition of its standard bidding document, called 'Procurement of Works', which provided the borrower with three options for the settlement of disputes, including the use of a three-person Dispute Board. The three-person Dispute Board was made mandatory for contracts in excess of US$500 million. Later in 1995, the International Federation of Consulting Engineers (FIDIC) published the first edition of its 'Orange Book', which introduced the Dispute Adjudication Board concept into FIDIC contracts. In 1996, the Dispute Resolution Board Foundation (DRBF) was established as a non-profit organization by a group of professionals involved in construction dispute resolution. The goal of DRBF was to promote the use of Dispute Board process and to serve as an educational resource and information exchange for owners, contractors and dispute board members. In 1999, FIDIC introduced both standing and ad hoc Dispute Boards. In 2017, all the FIDIC Rainbow Suite of Contracts underwent a significant review and now include the Dispute Board concept in its revised form of a Dispute Avoidance and Adjudication Board. Since the mid-1990s, milestones in expansion of the Dispute Board process have included adoption in 1997 by the Asian Development Bank and the European Bank for Reconstruction & Development for their internationally funded projects. In 2004, the International Chamber of Commerce (ICC) introduced its Dispute Board Rules, which allowed users to choose between a Dispute Review Board, a Dispute Adjudication Board and a combined Dispute Board. The ICC rules were subsequently updated in 2015 to incorporate, among other things, the concepts of Dispute Avoidance and Facilitation as part of the process.

Internationally, the DRBF project data base has tracked the use of Dispute Boards on projects worth in total more than US$275 billion.

i. Dispute Boards in Australia

The first use of a Dispute Board in Australia was in 1987 when a Dispute Board was used on the Ocean Outfalls Tunnel project in Sydney. A Dispute Board was used because the contractor was an American contractor and had had familiarity with the use of Dispute Boards from the United States. In 2003, the

[419] See Standing Committee No 4 ('Contracting Practices'), US National Committee on Tunneling Technology, *Better Contracting for Underground Construction* (National Research Council, 1974) (available at https://ntrl.ntis.gov/NTRL/dashboard/searchResults/titleDetail/PB236973.xhtml).

Australasian chapter of the US-based DRBF was formed, and the promotion of Dispute Boards was undertaken in a comprehensive manner.

Since 2003, there have been in Australia 114 projects completed or in progress, which have had a Dispute Board. The value of those projects in AUD (excluding inflation) ranged from $22 million to $8 billion. The total value of contracts involving a Dispute Board either in progress or completed since 2003 is in excess of $72 billion.

In Australia, most Australian contract documents had been 'bespoke' or 'purpose-written' instead of using standard forms of contract such as FIDIC. The Standards Australia form of contract most used in Australia (the AS4000 series) did not have a Dispute Board included and therefore the adoption of Dispute Boards required specific amendments to those contracts.

The use of the FIDIC form of contract has not been widespread in Australia, although the $4.6 billion Snowy 2.0 project (2019–2027) adopted the FIDIC form of contract with a Dispute Avoidance and Adjudication Board. A complete list of the projects in Australia that have used (or are using) a Dispute Board is to be found at www.drbf.org.au/projects-members/australia.

The main activity of Dispute Boards in Australia is one of avoidance and prevention. That is, the Dispute Board works with the project parties to identify issues and, using a variety of avoidance and prevention techniques, works with the project parties to resolve the issues before they become disputes.

One of the most common forms of Dispute Avoidance is for the parties to request the Dispute Board to prepare an In Confidence Without Prejudice Advisory Opinion. This is a quite formal process where the questions relating to an Issue are agreed, the parties make formal submissions in relation to those Issues and the Dispute Board issues a reasoned Advisory Opinion. It is quite common for Advisory Opinions to address only liability or entitlement questions and not proceed to determine quantum. In this history of Dispute Boards in Australia, it is difficult to identify the exact number of Advisory Opinions made by Dispute Boards, but it is estimated that there have been more than 60 Advisory Opinions made by Dispute Boards for projects in Australia.

In the event an Issue or potential Dispute cannot be avoided or prevented and is referred to the Dispute Board for a Decision (or Determination) (Decision), the Dispute Board acts like an expert determination panel and provides a Decision that is based on the contract between the parties and the law. In most projects in Australia, the Decision is 'interim binding'. 'Interim binding' means, in the context of Australian projects with Dispute Boards that the decision of a Dispute Board is final and binding on the parties unless one party lodges a Notice of Dissatisfaction within a period from the delivery of Decision. That period is usually 30–40 Business Days. When a party lodges a Notice of Dissatisfaction, the party giving the notice may proceed to the next stage of dispute resolution which, depending on the form of Contract, is either litigation (through the Courts) or arbitration. In the history of Dispute Boards in Australia, it is difficult to identify the exact number of Decisions made by Dispute Boards, but it is estimated that there have been in excess of 40 formal Decisions made by Dispute Boards for Projects in Australia.

There have been zero disputes that have not been resolved within the Dispute Board process in Australia. In other words, no Decision from the Dispute Boards for the 114 projects has proceeded to a litigation judgment or arbitral award. This means that all disputes on projects with a Dispute Board in Australia have been resolved within the Project itself.

If one were to compare projects with a Dispute Board with projects with no Dispute Board, it is inevitable that the projects with no Dispute Board will have disputes that proceeded to arbitration or litigation.

The dispute avoidance and prevention role undertaken by Dispute Boards in Australia is founded on the professionalism of the Dispute Board members and the trust that is generated between the parties' representatives and the Dispute Board members. Where a decision maker (either from the public or the private sector), has received reasoned Advisory Opinion or Decision from a Dispute Board (which consists of one or three experienced Dispute Board practitioners), the evidence suggests that those decision makers are highly likely to accept the reasoned Advisory Opinion or Decision and use that Advisory Opinion or Decision as a basis to settle the Issue or Dispute between the parties.

PART IV: POTENTIAL FOR REFORM

As set out above, the problem of overly adversarial dispute resolution and the costs that it can lead to in the delivery of infrastructure projects is not unknown to government, practitioners and scholars in India. Attempts at reform, valuable though not entirely adequate, that target this very problem have been made.[420] In particular, there are three recent developments, *all* of which cite as their motivation serious deficiencies in the operation of adversarial dispute resolution processes.[421]

First, the National Highways Authority of India (NHAI) has been advancing a number of initiatives for non-binding conciliatory resolution of contractors' claims. On 3 December 2012, a mechanism was instituted whereby pending claims could be referred to a committee of senior management in the NHAI, receive the recommendations of a new Independent Settlement Advisory Committee (ISAC),[422] and be approved by the Executive Committee of the NHAI.[423] In November 2015, the process evolved by requiring the public sector managers to provide a discussion paper to ISAC in the event that the negotiations failed at first instance explaining why they had failed, thereby placing greater accountability on the negotiators for failed negotiations.[424]

The success of this ADR initiative, under which 111 contract claims of total value ₹1.8 billion had been settled for only ₹171 million,[425] inspired the issuance of further directions by the NHAI, including a policy circular on 2 June 2017 that established a Conciliation Committee for the resolution of disputes in the course of a project, including those that had already progressed to or were pending arbitration.[426] This new policy replaced those that came before, and differs from them in that it provides far clearer procedures for the invocation of the Conciliation Committee and for its facilitation of the disposition of the claims.[427] Notably, it features detailed provisions for a multi-tiered conciliation process, whereby the dispute is to be escalated from the level of the NHAI's Executive Committee to the separately constituted Conciliation Committee that consists of independent experts.[428] The Conciliation Committee itself retains autonomy over the processes that it may take,[429] however the Committee's Terms of Reference clarify that 'mutual give and take constitutes the essence [of the

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[420] See generally Shri Kiren Rijiju (Minister of Law and Justice), Answer to Question No 2755, Lok Sabha, 4 August 2021 (available at https://legalaffairs.gov.in/sites/default/files/USQ%202755%20for%204%20Aug%202021.pdf).

[421] See NITI Aayog Office Memorandum No 14070/14/2016-PPPAU, 'Initiatives on the Measures for Revival of the Construction Sector' (5 September 2016); National Highways Authority of India (NHAI), Policy Circular No 2.1.23/2017 (2 June 2017); Ministry of Railways (Railway Board), Letter No 2021/Infra/21/2 (16 August 2021), citing Department of Economic Affairs Letter No 13/23/2020-PPP (2 August 2021); DFCCIL, Letter No HQ/LAWOSTLD/1/2020 (24 September 2021); *117th Report on The Mediation Bill 2021* (2022) (n 52) 1 [1.0].

[422] Under the Chairmanship of a former Justice of the High Court of Delhi: Shri Pon Radhakrishnan (Minister of Road Transport and Highways), Answer to Question No 6097, Lok Sabha, 30 April 2015 (available at https://eparlib.nic.in/bitstream/123456789/660944/1/15486.pdf).

[423] NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) [2.1]. A slightly different procedure emerged thereafter for different kinds of contracts: [2.3].

[424] Ibid [2.2]. Similarly, detailed reasons were required to be submitted by a composite committee that decided such claims pursuant to the different procedure that applied to other kinds of contracts: [2.3].

[425] Ibid [2.2].

[426] Ibid. The policy was made pursuant to proposals made by the NITI Aayog on 5 September 2016 (and approved by the Cabinet Committee on Economic Affairs on 31 August 2016) targeted at providing relief to contractors in the construction sector to whom payments had not been released by government entities: NITI Aayog Office Memorandum No 14070/14/2016-PPPAU, 'Initiatives on the Measures for Revival of the Construction Sector' (5 September 2016).

[427] NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) [3]. Note in particular the imposition of timelines within which amounts are to be paid and that the form of the Committee's recommended terms has a statutory basis: NHAI, Amendment 1 to Policy Guidelines dated 02.06.2017 of NHAI (19 June 2017) Annexure A.

[428] NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) [3.1]–[3.5].

[429] The Committee met and issued amendments to the procedures outlined in the original policy 17 days after it was circulated: NHAI, Amendment 1 to Policy Guidelines dated 02.06.2017 of NHAI (19 June 2017).

Committee's task]' as opposed to the strict adjudication according to law of the parties' respective submissions, and hence 'the parties are expected to be brief and to the point … and view the exercise in the spirit of conciliation/settlement'.[430]

Certainly, the encouragement within the NHAI of a change in approach is welcome. The functions of the Conciliation Committees clearly share many features with the dispute avoidance boards advocated in this paper.[431] Notable also is the varied expertise possessed by those on the Committee, with representation from both the public and private sector, and from legal, technical, financial and industry backgrounds.[432]

Whether the implementation and use of this procedure is likely to break the gridlock remains to be seen. Prima facie, and insofar as arbitration and litigation continue to be seen as the inevitable final steps of all disputes that arise, the implementation of more non-binding processes prior to them does not solve the issue at hand.[433] The Committee, however, is notably permitted to take into account the strengths and weaknesses of the NHAI's case, and to encourage avenues towards settlement that facilitate the purpose of the policy, namely the avoidance of delays brought on by adversarial dispute resolution processes.[434] Its therefore has the capacity to combat the issue at hand more actively than other forms of conciliatory ADR, such as mediation or negotiation, might permit. It is noteworthy that the NHAI undertakes in its policy circular to 'honour and implement the recommendations/decisions of the Conciliation Committee of Independent Experts',[435] which undertaking, however, is not binding and is subject to the other forces described in this paper that influence decisions (or indecision) on the part of government entities.

In a similar vein, the Department of Economic Affairs recommended, on advice from various experts and stakeholders, the following to the Ministry of Railways:[436]

> *Task force should be created for project implementation — Multiple approvals from various authorities are required for undertaking a project. Rather 'War room' model comprising officials from multiple authorities meeting every week should be set up for fast tracking all the approvals required.*

Promising as this idea seems, it remains to be seen whether it might be systematically implemented and, if so, how it would fare in light of the issues discussed above.[437]

The second set of changes occurred in the adoption of new policies by the Dedicated Freight Corridor Corporation of India Limited (DFCCIL), a public sector undertaking that is seeing the delivery of dedicated freight corridors throughout the country. Apart from general provisions for increased resources being deployed in the speedy resolution of claims, the changes all centre upon the treatment of decisions of Dispute Adjudication Boards, and namely provide for the implementation of the DAB's

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[430] NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) Annexure 1 [7].
[431] See **Part III Section D. Dispute Avoidance Boards for Project Facilitation** above. See also Musenero, Baroudi & Gunawan (2023) (n 29) 3.
[432] See NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) [4.1]. Two Committees of three members each were constituted pursuant to the original policy circular, and a third committee was subsequently constituted pursuant to NHAI, Policy Circular No 2.1.31/2019 (15 September 2019).
[433] See Sneha P et al (2021) (n 4), viewing this as an inappropriate 'transferral' or 'diversification' of risk: at 57.
[434] NHAI, Policy Circular No 2.1.27/2018 (18 July 2018) [1(e)], [1(h)].
[435] NHAI, Policy Circular No 2.1.23/2017 (2 June 2017) [6]; NHAI, Policy Circular No 2.1.27/2018 (18 July 2018) [1(h)]. The Contractor makes no such undertaking and is not compelled to engage in this voluntary process: [9.2].
[436] See Ministry of Railways (Railway Board), Letter No 2021/Infra/21/2 (16 August 2021), quoting Department of Economic Affairs, Letter No 13/23/2020-PPP (2 August 2021).
[437] For a general summary of the uptake of similar such ADR systems in the Indian infrastructure context, see Musenero, Baroudi & Gunawan (2023) (n 29) 3.

decision regardless of whether a Notice of Dissatisfaction will be or has been submitted — as a matter of policy and for incorporation into future contracts.[438] In particular, if the DFCCIL is the dissatisfied party, it is to pay 75% of the amount decided against it by the dispute board's adjudication (plus interest) into an escrow account of the contractor, immediately and prior to filing any NOD, which amount is to be matched by a like bank guarantee by the contractor.[439] This policy was initiated on 24 September 2021, but was extended in its application on 28 January 2022 such that it applied both to future dispute board decisions against the DFCCIL and to existing decisions against it.[440]

The third and most recent development is the passing of the *Mediation Act 2023* (India), which consists in a wholescale reform of the law relating to mediation.[441] The Act was introduced in 2021 following India's signing of the UNCITRAL's *Convention on International Settlement Agreements Resulting from Mediation* (Singapore Convention on Mediation) on 7 August 2019, which serves to improve the attractiveness of mediation as a valuable for of international dispute resolution by providing for the international enforcement of mediated settlement agreements.[442] The Act replaces Part III of the *Arbitration and Conciliation Act 1996* (India),[443] which concerned laws and procedures pertaining to 'conciliation' — while a distinction is sometimes observed between mediation and conciliation,[444] the Act brings the law in line with a preference generally observed for the term, 'mediation'.[445]

Salient features of the law include: provisions for compulsory pre-litigation mediation;[446] the possibility for court-ordered mediation;[447] the imposition of time limits within which the mediation is to be completed, which notably were reduced from an initial figure of 180 days with a possible extension of a further 180 days to 120 days with a possible extension of 60 days;[448] provisions for binding mediated settlement agreements,[449] enforceable in the same manner as judgments of a court and challengeable only on limited grounds;[450] and the constitution of the Mediation Council of India, so as to establish the requisite infrastructure for the smooth operation of the mediation law.[451] Notably, while it was considered significant that certain kinds of dispute be excluded from the law's operation,[452] it was said that a blanket exclusion of the Government, the 'biggest litigant in the country', would render

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[438] See also Moza & Paul (2018) (n 5), coming to the conclusion that claims for withheld payments were in almost all cases successfully pursued and recovered, that they were therefore the most likely to be 'genuine', and (prophetically) that a policy should be implemented for the immediate payment of a large portion of the amount claimed pending final exhaustion of all dispute resolution mechanisms: at 21.

[439] DFCCIL, Letter No HQ/LAWOSTLD/1/2020 (24 September 2021).

[440] DFCCIL, Letter No-HQ/LAWOSTLD/1/2020 (28 January 2022).

[441] Passed by the Rajya Sabha on 1 August 2023 and by the Lok Sabha on 7 August 2023. The Act received Presidential Assent on 14 September 2023.

[442] *117th Report on The Mediation Bill 2021* (2022) (n 52) 6 [1.12]–[1.13]. The Convention entered into force on 12 September 2020, although India has yet to ratify the Convention.

[443] *Mediation Act 2023* (India) s 61, sch 6. See also *117th Report on The Mediation Bill 2021* (2022) (n 52) 2 [1.3(iii)].

[444] See, eg, Laurence Boulle, *Mediation: Principles, Process, Practice* (LexisNexis, 3rd ed, 2011) 148 [5.15]. Generally speaking, conciliation is considered to admit of greater intervention from the conciliator, who is notably permitted to comment on the parties' respective positions and propose orders or terms for the parties' consensual settlement, in a manner that is typically foreign to the role of the mediator. A statutorily-appointed conciliation committee may also seek proactively to promote and enforce the aims of the relevant statute: see above in the context of the Conciliation Committee. See also Musenero, Baroudi & Gunawan (2023) (n 29) 2.

[445] *117th Report on The Mediation Bill 2021* (2022) (n 52) 5–6 [1.11], 6 [1.14].

[446] *Mediation Act 2023* (India) s 5.

[447] Ibid s 7.

[448] Ibid ss 18(1)–(2); *117th Report on The Mediation Bill 2021* (2022) (n 52) 44 [3.137]–[3.138], 45 [3.143]. However, the imposition of time limits in legislation is far from a guarantee that they will be followed and delays reduced: see, discussing a similar situation in Indian insolvency law, Kamalnath & Kaul (2022) (n 43) 167.

[449] *Mediation Act 2023* (India) ss 19–20.

[450] Ibid ss 27–28.

[451] Ibid ch 8.

[452] See ibid sch 1.

the Bill 'infructuous' in actually reducing the caseload before the courts.[453] Accordingly, the Act *does* apply to the Government in respect of 'commercial matters', such as those between it and contractors in infrastructure projects.[454]

Generally speaking, the formalisation of non-adversarial dispute resolution procedures, particularly those pertaining to the enforceability of mediated settlement agreements, plays an important role in improving their attractiveness and effectiveness.[455] When engaged in by government, it has the potential perceptual benefit of inspiring more widespread confidence in such non-litigatory forms of dispute resolution.[456] Ultimately, however, this is unlikely to resolve the problem at hand. Unless a willingness on the part of government manifests itself to cooperate to resolve claims with contractors, there is no way of ensuring that mediations are successful. Though court-ordered mediation notionally reduces the caseload of the court, that is not a remedy for the situation whereby parties have already exhausted all other alternative dispute resolution mechanisms and are coming before the courts, essentially as a matter of course, for a setting-aside application. For example, while the six-week conciliation ordered by the Supreme Court in *Misra & Co v Damodar Valley Corporation*[457] may have been the best course of action at the time, that conciliation by no means erased the fact that the Supreme Court was hearing the matter over three decades after the contract was awarded.[458]

The abovementioned efforts surely militate against a conclusion that a reformed approach to dispute resolution in Indian infrastructure projects, that views arbitration and litigation as not incompatible with renewed interim efforts at negotiation, is not, as has been suggested, unviable for cultural or other reasons.[459]

Arbitration is an example of where the situation, for all its problems discussed above, has been improving, such that India is increasingly being described as a pro-arbitration jurisdiction. An example of a positive development with respect to arbitration, and the granting of powers to the tribunal as a means of minimising judicial intervention, is the judicial clarification of the tribunal's power to direct parties to produce documentary evidence, and make adverse inferences where appropriate should a party fail to follow such directions.[460] Arbitral process, however, can only be bent so far. A legal (statutory or contractual) restriction on a party's right to challenge an award in court is neither a desirable nor viable solution to the problem.[461]

In order to respond to the issue of ineffective dispute resolution discussed above, it is necessary to confront each root cause of the issue, and respond in like manner with a solution that effectively stops up the myriad sources of difficulty. For example, the drafting of new policies and guidelines alone is not sufficient to bring about a wider change in approach, or to motivate individual members of the

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[453] *117th Report on The Mediation Bill 2021* (2022) (n 52) 13 [3.9]–[3.11].

[454] *Mediation Act 2023* (India) s 2(iv): 'This Act shall apply where mediation is conducted in India, and … wherein one of the parties to the dispute is the Central Government or a State Government or agencies, public bodies, corporations and local bodies, including entities controlled or owned by such Government and where the matter pertains to a commercial dispute'. See also *117th Report on The Mediation Bill 2021* (2022) (n 52) 2 [1.3(ii)].

[455] See *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 378 [58] (Kaul J for the Court).

[456] *117th Report on The Mediation Bill 2021* (2022) (n 52) 13–14 [3.12].

[457] (2018) 11 SCC 269.

[458] See *Misra & Co v Damodar Valley Corporation* (n 45) 274 [14]–[15] (Bhushan J for the Court). See also *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 377 [51] (Kaul J for the Court).

[459] Cf Alina & Malik (2022) (n 134) 128.

[460] This development is discussed in Ashok Kumar Singh, 'Production and Discovery of Documents in Arbitration in India: A Comparative Analysis' in Vijay K Bhatia et al (eds), *International Arbitration Discourse and Practices in Asia* (Routledge, 2018) 176, 181–4.

[461] See generally Gracious Timothy Dunna, 'Waiver of the Right to Set-Aside and Resist the Enforcement of an Arbitral Award: An Indian Perspective' (2020) 16(1) *Asian International Arbitration Journal* 69.

public service to change their attitude towards decision-making.[462] Contrarily, while measures, such as disciplinary action,[463] or the imposition of costs,[464] that target individuals who refuse to pay due attention to the need for effective dispute resolution will certainly play some role in changing the decision-making calculus of such individuals, this will not erase the systemic factors that encourage risk aversion and inaction in the first place. Simply advocating for a 'culture change', without prescribing procedures that actually facilitate such a change, is not an adequate remedy.[465]

One way of reshaping the behaviour of such individuals is to pose an alternative to arbitration and litigation that suits their interests. As noted above, the reason for the almost automatic rejection of claims and commencement of proceedings is so as to enable public servants to disclaim all responsibility and disavow any perception of corruption. However, the use of expert advice, such as by way of a dispute avoidance board, can accomplish the same function. Namely, individuals from government should be encouraged to refer matters to such boards with a view to obtaining impartial, third-party advice as to how to proceed. For a public servant to act on that advice can in no sense be construed as involving corruption towards the private sector entity in question, even if the decision ultimately favours that party. This enables the interests of the project to be kept at the forefront, while providing civil servants with an effective and authentic shield against future investigation.

A serious reappraisal of the role of dispute boards is in order. Consonant with the discussion above in the Australian context, the use of dispute boards for the purposes of avoidance and prevention, rather than merely adjudication, of disputes, reflects the most valuable and efficient means of keeping projects on track. This reflects the prevailing trends in contracting for dispute boards, such as can be seen in the 2017 FIDIC form of contract and the precedents published by the DRBF,[466] both of which have expanded the avoidance role and functions of dispute boards. It is imperative that this function be promoted, lest dispute boards become (or continue to be) an inevitable antecedent to subsequent arbitration and litigation.

It is recognised in democratic systems of governments that there must be accountability for decision-making, and strong mechanisms need to be in place to deter and to root out corruption.[467] Those factors are common to Australian infrastructure and to Indian infrastructure developments.[468] Indeed, maintaining accountability and safeguarding against corruption are not concerns that are extrinsic to improving the efficiency of infrastructure procurement:[469] corruption is a major obstacle against ensuring competitiveness,[470] which is the most well-supported means of improving the quality

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[462] See *Punjab State Power Corporation Ltd v Atma Singh Grewal* (n 60) 673 [11], [13] (Radhakrishnan and Sikri JJ); *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 378 [57] (Kaul J for the Court).

[463] See, eg, Law Commission of India (1988) (n 43) 41 [8.14].

[464] See, eg, *Punjab State Power Corporation Ltd v Atma Singh Grewal* (n 60) 669 [6], 673–4 [14] (Radhakrishnan and Sikri JJ)

[465] Musenero, Baroudi & Gunawan (2023) (n 29) 7.

[466] See https://drbf.org.au/document/example-db-provisions.

[467] Sneha P et al (2021) (n 4), 61.

[468] See particularly Department of Expenditure, Ministry of Finance, *General Financial Rules 2017* (Government of India, amended 31 July 2023) r 144: '[e]very authority delegated with the financial powers of procuring goods [and works] in public interest shall have the responsibility and accountability to bring efficiency, economy, and transparency in matters relating to public procurement and for fair and equitable treatment of suppliers and promotion of competition in public procurement' (emphasis added). On the anti-corruption culture shift in India, see Jha (2018) (n 148) 516; Singh & Singh (2011) (n 148) 371; Sridharan (2017) (n 148) 270.

[469] See particularly Sneha P et al (2021) (n 4), noting the correspondence between effective corruption control and bureaucratic effectiveness: at 78.

[470] See generally Isabelle Adam et al, *India's Federal Procurement Data Infrastructure: Observations and Recommendations* (Anti-Corruption Evidence Research Programme, February 2020) (available at https://ace.globalintegrity.org/wp-content/uploads/2020/03/RedFlag_India.pdf) 1–3; Ahluwalia (2019) (n 6) 93; Arimoro (2020) (n 11) 114; Manu et al (2021) (n 19) 3327, 3335–6.

and decreasing the cost of publicly procured works.[471] Wasted costs owed to corruption in respect of construction contracts in developing countries have been said to amount to between 10% and 30% of the overall project cost.[472] This only highlights the contradiction in having systems designed at ensuring accountability that, however, hamper productivity. In particular, and as was foreshadowed above, the narrow criteria for assessment used by current auditing measures only encourage public servants that are actually corrupt to pursue different means of furthering their self-interests, safe in the knowledge that the auditing authorities will only be investigating, for example, the paper trail (rather than money trail).[473]

It is, however, possible to combine accountability with timely resolution of project disputes, and to ensure that decisions made to resolve these disputes are able to be openly and conclusively demonstrated to be appropriate.[474] It is suggested that the concerns highlighted above with inefficient dispute resolution and bureaucratic indecision also feature as an area for the assessment of State auditing authorities.[475] Ironically, the Law Commission of India, in commenting on the problem of indecision and lack of accountability, concluded that a robust system of social auditing was desperately needed[476] — whereas the present circumstances reveal that that system of auditing is, in fact, having the opposite effect. The unique and powerful position that the CAG, for example, has already carved out for itself has great potential to be used to foster real change, if it is properly oriented to confront the issue at hand.[477]

This is not to say that merely expediting decision-making will resolve the problem — recall, for instance, the issues articulated above with an overly hasty approach to the tendering and design of public works.[478] It is essential that decisions are made in the context of an effective framework for public procurement and contracting of public works. As this paper has discussed, that necessitates a more proactive, collaborative approach to procurement at the early stages of projects.[479] In summary, the focus should shift from correction to prevention of the issues underlying these disputes in the first place,[480] and monitoring of those issues during the delivery of the project.[481]

The potential for the creation of national uniform procurement policies to respond to these challenges is certainly present, as no such consistent, overarching direction is conspicuous in respect of, for example, national PPP policy.[482] The adoption of standard-form contracts, including Model Concession Agreements in PPP projects, that address these issues is a welcome change, insofar as they prescribe clear and effective procedures for decision-making and dispute resolution, which procedures become increasingly ingrained and well-oiled the more familiar that government and industry becomes

[471] See especially Catalão, Cruz & Sarmento (2023) (n 30) 1106. See also Dolla & Laishram (2020) (n 118) 376.
[472] Adam, Josephson & Lindahl (2017) (n 28) 394.
[473] Sneha P et al (2021) (n 4), 62–3, 68, 75; Sridharan (2017) (n 148) 286–7.
[474] See Mukhopadhyay (2017) (n 166), referring to the need to obtain this balance: at 325.
[475] A similar such call was recently made by Catalão, Cruz & Sarmento (2023) (n 30), highlighting the need to pair anti-corruption controls with strategies that prioritise the project itself: at 1122–3.
[476] Law Commission of India (1988) (n 43) 8 [2.1]. See also *State of Punjab v Geeta Iron & Brass Works* (n 62) 69 [4] (Krishna Iyer J for the Court).
[477] See Adam, Josephson & Lindahl (2017) (n 28) 398–9.
[478] See **Part II Section B. The National Level – India's Procurement Framework**.
[479] See Asiedu & Abaku (2020) (n 21) 77.
[480] Moza & Paul (2018) (n 5) 24; Manu et al (2021) (n 19) 3335–6.
[481] See, eg, Love et al (2022) (n 111) 3172, 3179–81.
[482] Arimoro (2020) (n 11) 104. On the problem of patchwork legislation and piecemeal policy development, see Kamalnath & Kaul (2022) (n 43) 164.

with them.[483] These should include the more advanced provisions relating to dispute avoidance boards discussed above.

From the perspective of the public sector entity that is seeking to effect delivery of the project, the purpose of procurement policies and contracts may be summarised as that of managing *uncertainty*: of the project at hand, the capacity of the contractor to fulfil what is required of it, of factors, such as a pandemic, outside the scope of the contract, etc.[484] The approach to managing these factors may involve reducing the scope and complexity of the contract — its uncertain variables — such as by reducing the number and size of megaprojects by unbundling projects into smaller, more manageable portions;[485] however the viability of doing so in respect of infrastructure projects that are inherently massive and complex is questionable. Perhaps what is of more interest is alternative approach of maintaining the scope of the work and its design, but supplementing and surrounding it by a robust governance structure and mechanisms that facilitate effective 'sequential' decision-making.[486] There is a clear link in incidence of disputes and their prolongation and an absence of clear dispute resolution processes enshrined in legislation and policies.[487] The particular problem highlighted above in respect of contract renegotiation may be remedied by implementing a freeze period after a contract is awarded, which is designed to encourage the parties to arrive at the proper cost estimate at the first instance before the project is committed.[488]

Likewise, the implementation of a Model Litigant Policy that curbs more immediately the influx of government-led disputes in the courts should be regarded as imperative. The foundation of such a policy has long been discussed by Indian courts and law reform commissions,[489] although no substantive progress has yet been forthcoming.[490] As regards the implementation of policies, including model litigant policies, designed to promote effective dispute resolution, it is imperative that such policies be applied to both the Government (and its Ministries, etc) and public sector undertakings: while Government is involved in 'only' 626,000 of the cases pending before the courts, millions involve government entities and public sector undertakings.[491] This issue was expressly commented on by the Supreme Court, who noted that while initiatives may be underway amidst the Union Government to reduce its reliance on litigation, it is more pressing that policies of this kind be adopted by State governments and statutory authorities, which are more litigious by far.[492] However, the extension of such policies to public sector undertakings may be vitiated by the fact that such undertakings by their

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[483] See generally Pratap & Chakrabarti (2017) (n 9) 228–31. For a discussion of the undesirability of a more ad hoc approach to contracting in the context of infrastructure projects in Ghana, see Asiedu & Abaku (2020) (n 21) 74. Cf, however, Pratap & Chakrabarti (2017) (n 9), insofar as India's positive reforms in PPP policy were compared positively to the absence of such systematic reforms in South America: at 267–8.

[484] Dolla & Laishram (2021) (n 130) 537–8.

[485] Which approach has been recommended by Australian procurement authorities: House of Representatives Standing Committee (2022) (n 197) 112–14 [6.40]–[6.49]; Infrastructure NSW, *Staying Ahead* (2022) (n 203) 9. See also Adam, Josephson & Lindahl (2017) (n 28), noting the clear correlation between project size, likelihood of dispute and cost overruns (at 396–7), citing Pramen P Shrestha, Leslie A Burns & David R Shields, 'Magnitude of Construction Cost and Schedule Overruns in Public Work Projects' [2013] (1) *Journal of Construction Engineering* 1.

[486] See Oliver E Williamson, 'Transaction Cost Economics: The Governance of Contractual Relations' (1979) 22(2) *Journal of Law & Economics* 233, 254, cited in Dolla & Laishram (2021) (n 130) 537.

[487] Musenero, Baroudi & Gunawan (2023) (n 29) 7.

[488] See Pratap & Chakrabarti (2017) (n 9) 279.

[489] See Law Commission of India (1988) (n 43) 12 et seq; *Urban Improvement Trust, Bikaner v Mohan Lal* (n 61) 514 [5] (Raveendran J for the Court); *National Co-Operative Development Corporation v Commissioner of Income Tax (Delhi-V)* (n 40) 381 [71] (Kaul J for the Court).

[490] Shri Arjun Ram Meghwal (Minister for Law and Justice, Minister for Parliament Affairs and Minister for Culture), Answer to Question No 252, Lok Sabha, 21 July 2023 (available from https://legalaffairs.gov.in/sites/default/files/AU252.pdf).

[491] Ibid.

[492] *Urban Improvement Trust, Bikaner v Mohan Lal* (n 61) 516 [11] (Raveendran J for the Court)

nature possess the ambivalent (in the literal sense) objective of simultaneously furthering the socio-economic objective for which they were constituted while also operating as a profitable company.[493] As was noted above in the Australian context, government-owned corporations may instead need to be subjected to ad hoc policies which, unless they are formulated in accordance with an overarching policy schema and are strictly adhered to, risk being nugatory in their effect.

Simply imposing polices that provide timelines for government action, or that are designed to encourage the government to settle disputes rather than permit them to be litigated, is an insufficient remedy to a problem that manifests itself also at this individual level. For example, it was noted in the Supreme Court that the purpose behind Section 80 of the Civil Procedure Code, which required that two-months' notice be given before initiating proceedings against the government, was designed to alert the relevant government officer of the existence of a dispute and motivate it to negotiate a settlement.[494] In practice, however, the expiration of the two-month barrier without a substantive government response has become commonplace, and, far from encouraging the swift resolution of the dispute, creates yet more delay and an increasingly adversarial relationship between government and contractor.[495] Obversely, to simply encourage individual officials to exercise greater initiative without acknowledging and correcting for the faulty framework within which they are operating is to place undue pressure on such individuals[496] — individual officials, whose daily tasks currently often resemble 'box-ticking' in respect of technical matters,[497] should be formally assigned more authority to proceed and make decisions.[498] Only through an approach that responds to the multifarious nature of the problem will substantive results be forthcoming.

[493] Singh & Singh (2011) (n 148) 241.
[494] *State of Punjab v Geeta Iron & Brass Works* (n 62) 69 [4] (Krishna Iyer J for the Court).
[495] Ibid, cited with approval in Law Commission of India (1988) (n 43) 10 [2.5]; *Punjab State Power Corporation Ltd v Atma Singh Grewal* (n 60) 671–2 [9] (Radhakrishnan and Sikri JJ).
[496] Which point is made also by Sneha P et al (2021) (n 4) 56, 58.
[497] Ibid 67.
[498] Singh (2017) (n 163) 193; Krishnan & Somanathan (2017) (n 156) 408–9. See also ibid 63.

CONCLUSION

Neither the problems nor the solutions discussed in this paper are novel or radical by any means. By contrast, they have been the subject of great scholarly interest and governmental investigation, including most prominently by Indian jurists and law reform bodies. What this paper has highlighted is the need for reforms to target all aspects of the problem of inefficient dispute resolution in infrastructure procurement. To summarise the discussion of **Part IV: Potential for Reform** above, reforms should include:

A) Changes to procurement policy, to avoid adversarial contracting strategies that invariably give rise to disputes, and to encourage dispute avoidance and prevention.

B) Changes to the structure and goals of both project teams and auditing bodies, such that the latter stop hindering the former in their ability to make decisions for the good of the project.

C) Changes to judicial and arbitral practice and procedure that prevent those disputes that do escalate from becoming protracted and costly.

Only if all three avenues are pursued simultaneously will there be a real opportunity to reverse the trends that threaten to derail India's infrastructure pipeline. To repeat the quotation extracted at the start of this paper:

> *There is a tendency to either deny the existence of the problem, procrastinate over it, pass the file over to another authority, or dismiss the problem as altogether unsolvable.*[499]

It is hoped that the readers of this paper might take these words to heart, and in doing so appreciate the seriousness of the problem that this paper has discussed and the urgent need for reform.

[499] Sneha P et al (2021) (n 4) 57.