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Written Submissions

COURT DETAILS

Court	Supreme Court of New South Wales, Court of Appeal
List	Court of Appeal
Registry	Supreme Court Sydney
Case number	2025/00273969

TITLE OF PROCEEDINGS

First Applicant	CLOUGH PROJECTS AUSTRALIA PTY LTD ACN 109444215
Second Applicant	Salvatore Algeri
Number of Applicants	3
First Respondent	ELECNOR AUSTRALIA PTY LTD ACN 168435658

FILING DETAILS

Filed for	ELECNOR AUSTRALIA PTY LTD,Respondent 1
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ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Lodge Document, along with any other documents listed below, were filed by the Court.

Written Submissions (20251030 Clough v Elecnor - Respondent Submissions.pdf)

[attach.]

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CLOUGH PROJECTS AUSTRALIA PTY LTD & ORS

v

ELECNOR AUSTRALIA PTY LTD

Respondent's Submissions

A. INTRODUCTION

1. The respondent (**Elecnor**) is a party to a Joint Venture Deed (**JV Deed**) with the first applicant (**Clough**) concerning their joint venture for the design and build of an electricity transmission system pursuant to an Engineer, Procure and Construct Deed with Transgrid (**EPC Contract**): J[2]-[4]. Under the JV Deed, each party was entitled to acquire the interest of the other in the joint venture in circumstances where the other was in "*Material Default*", including through an event of insolvency. Clough entered into voluntary administration, and the second and third applicants (**Trustees**), being trustees of a creditors' trust consequential upon a Deed of Company Arrangement (**DOCA**), disavowed adoption of the JV Deed on their part while at the same time contending that the DOCA and *Corporations Act 2001* (Cth) precluded Elecnor from exercising its rights to acquire Cloughs's interest in the joint venture: J[41]. Elecnor commenced these proceedings against Clough and the Trustees, seeking declarations to the contrary of the Trustees' position and further relief in the form of an order for specific performance to engage the expert determination process under the JV Deed, through which Clough's interest can be valued and then bought by Elecnor: J[8].

2. When filing their Commercial List Response (**CLR**) and Cross-Claim, the applicants sought to raise new claims (some of which did not exist when Elecnor commenced the proceedings) that would have changed the proceedings from a dispute concerning narrow questions on the effect of the DOCA into a large and complex factual dispute concerning a wide range of obligations under the JV Deed. That strategy was foiled by the arbitration agreement in the JV Deed, which requires such disputes to be resolved by arbitration in Singapore.

3. The primary judge correctly referred the factual dispute raised on the applicants' Cross-Claim to arbitration (the Trustees claiming through or under Clough in respect of that matter): *Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd* [2025] NSWSC 610 (**J**). That is the main issue raised by the draft Notice of Appeal. Elecnor further contends that his Honour erred by not also referring a separate dispute raised by the

applicants in their CLR, concerning other alleged breaches by Elecnor of various provisions of the JV Deed: White Folder (**WF**) WF276 [7](b)(iv) and 285 [29](d). This is the subject of Elecnor's draft Notice of Cross-Appeal.

4. In their application for leave to appeal, the applicants contend that the primary judge should have referred nothing to arbitration. In their submissions filed 14 October 2025 (**AS**), the applicants hinge their arguments upon one paragraph of Elecnor's Commercial List Statement (**CLS**), being the general allegation of readiness and willingness to perform in seeking the additional relief of specific performance: WF269 [32]. This, they claim, had the result of bringing into play, as part of one all-encompassing "*matter*", any and every breach of the JV Deed that one party wished to assert against the other. The result, so it is claimed, is that Elecnor "*waived*" the application of the arbitration agreement to any claims or otherwise repudiated or abandoned the agreement by commencing these proceedings. These arguments are contrary to established principles of arbitration law and equity. The application for leave to appeal (or the appeal) should be dismissed with costs.

B. BACKGROUND

5. The relevant background is set out at J[1]-[50]. While much of the applicants' summary (AS[3]-[12]) focusses on the background to the claim advanced in their Cross-Claim (the **Securities Recovery Claim**), it is uncontroversial that this claim had not been ventilated, nor did it exist, when Elecnor commenced proceedings: J[8]-[9], [17], [41]-[43] and [129]. Similarly, the claim made by the applicants at [29](d) (read with [7](b)(iv)) of their CLR, that Elecnor's offer to purchase Clough's interest under cl 21.3 of the JV Deed was in breach of various good faith and similar obligations under the Deed (the **Bad Faith Breach Contention**), was raised for the first time in the applicants' CLR: J[10] and [40]-[41].

6. Accordingly, when Elecnor commenced the proceedings below, the only dispute that had been ventilated between the parties was whether the DOCA effectively transferred the interests of Clough under the JV Deed to the Trustees: J[40]. The primary relief sought by Elecnor was a declaration that the DOCA did not cause Clough's interests in the joint venture, the JV Deed, or the EPC Contract, to be transferred to the Trustees: J[42]. The bulk of the allegations made in the CLS were directed to that relief: see WF265 ff at [1]-[11], [16], [20]-[30] and [33].

7. In addition to the declaration, Elecnor sought specific performance of the obligations under cl 21.3 of the JV Deed and an associated expert determination procedure in Sched 3 of the JV Deed to resolve the value of Clough's interest: Summons [2] (WF257); CLS (WF262

ff) [12]-[15], [17]-[19] and [28]-[33]. On the basis of what had been in dispute at that time, specific performance would have followed as a matter of course if Elecnor established its entitlement to the declaration as sought. The claims in support of both sets of relief were referred to together by the primary judge as the "*Clause 21.3 Matter*": J[102]. Elecnor submitted below that the two claims involved distinct "*matters*", but how they were characterised did not affect the outcome of the motions: WF106 [71]. For the same reasons, whether the "*Clause 21.3 Matter*" is one or more distinct "*matters*" does not affect the outcome of the applications for leave to appeal or cross-appeal.

8. Almost three months after Elecnor had commenced proceedings, the Trustees issued a demand, purportedly under cl 13.2 of the JV Deed, for Elecnor to pay some $55 million as contribution to a call on security that Transgrid had previously made on Clough: J[43]. Clause 13.2, which is set out J[17], concerns security that was provided by both joint venturers under the EPC Contract to Transgrid. Clause 13.2(a) provides, in effect, that if Transgrid calls on one party's security but not the other's, the other party is to pay to the first party an amount for the security called upon proportionate to their interest in the joint venture. This obligation only arises if and once the first party makes a written demand for such payment. Neither Clough nor the Trustees had any claim against Elecnor unless and until a demand was first made, which was not until 7 March 2025 at the earliest (well after these proceedings were commenced on 16 December 2024), if at all.

9. The obligation to pay following a demand under cl 13.2 is also subject to three exceptions, being: the requirement for the first party to use best endeavours to mitigate any loss suffered (cl 13.2(a)(iii)); where the call on security was based on an act or omission by the first party which is a "*Material Default*" or unrelated to the project (cl 13.2(b)); or where the first party is required to indemnify the other party under clause 7 (WF318), including for Material Defaults: cl 13.2(a)(iv). While Elecnor has not responded to the Trustees' claim under cl 13.2, given it has been referred to arbitration, Elecnor foreshadowed below that its response may include reliance on one or more of these exceptions, resulting in larger factual and legal disputes as to Clough's compliance with the JV Deed: see J[106].

10. On the same day that the Trustees issued the demand, the applicants filed their CLR raising, for the first time, the Bad Faith Breach Contention: J[44]-[47]. A Cross-Claim seeking "*contribution*" under cl 13.2 of the JV Deed (i.e., the Securities Recovery Claim) followed seven days later: J[48]-[49].

11. Before making any statement on the substance of these disputes, Elecnor invited the

applicants to withdraw their Cross-Claim on account of it being subject to the arbitration agreement (WF574), and thereafter filed a motion seeking it to be stayed under s 7(2) of the *International Arbitration Act 1974* (Cth) (**IAA**). That motion was subsequently amended to also seek a stay of the Bad Faith Breach Contention: WF61.

C. RESPONSE TO DRAFT APPEAL GROUNDS

(1) Appeal Ground One: The "matter" question (AS[13]-[20])

12. Contrary to AS[13]-[20], the primary judge was correct to find that the Securities Recovery Claim raised a matter that was capable of settlement by arbitration and therefore was required to be stayed under s 7(2) of the IAA: J[102] and [107]. There are three key flaws in the applicants' contentions to the contrary.

13. *First*, the characterisation of a "*matter*" does not arise on the question of whether the Cross-Claim ought to have been stayed. The arbitration agreement is broad (WF341), the applicants accept that the Cross-Claim includes controversies within the scope of the arbitration agreement (AS[26]) and there is no challenge to the primary judge's finding that what was stayed is susceptible of settlement as a discrete controversy: J[106]. It necessarily follows that the Cross-Claim contained a matter capable of settlement by arbitration and s 7(2) of the IAA mandated a stay, unless the applicants can establish that the arbitration agreement is "*inoperative*" within the meaning of s 7(5).

14. The bases on which the applicants contend the agreement to be "*inoperative*" turn on various permutations of the amorphous concept of "*waiver*", which all require, as addressed below, Elecnor to have intentionally and knowingly foregone its right to arbitrate the controversy raised on the Cross-Claim. Given that the Cross-Claim advances a claim that did not exist and had not been foreshadowed when Elecnor commenced these proceedings, there is no basis for finding any such intentional and knowing "*waiver*". The result is that the exception to the mandatory stay in s 7(2) does not arise, and the primary judge's stay of the Cross-Claim was the statutorily mandated outcome.

15. *Secondly*, and in any event, the applicants do not engage with settled principles concerning the meaning and identification of a "*matter*", which principles were correctly identified and applied by the primary judge: J[94]-[95]. Instead, the applicants contend that any "*of the various grounds*" (AS[15]) that "*may provide a defence*" (AS[18]) to another's claims are necessarily all part of "*a wide-ranging and interlocking controversy*" (AS[20]), such that all defences form part of the same matter as a claim: AS[19].

16. A "*matter*" in the context of s 7 of the IAA is not a claim combined with every defence that can be raised thereto. It is instead any right or liability in dispute which is susceptible of settlement as a discrete controversy.[1] Context, as always, is important and the context in which the word "*matter*" appears in s 7 is to identify whether there are controversies before the Court that should be stayed in pursuance of an arbitration agreement. Thus, and as the Full Court explained in *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at [157] (Allsop CJ, Besanko and O'Callaghan JJ), the approach to identifying "*matters*" is affected by the construction of the arbitration agreement. Where there is a broadly drafted arbitration agreement, there is often little need to identify the various "*matters*" raised beyond a recognition that they all in some way arise out of or are in connection with the agreement the subject of the arbitration clause. If, however, the arbitration agreement captures only certain disputes or connections to an operative document, or the proceedings raise non-arbitrable controversies (such as between non-parties to the arbitration agreement or issues that cannot be arbitrated), then "*close attention will be required to each individual issue or dispute to identify that connection, and so to identify the 'matter'*": ibid.

17. There is no authority in support of the proposition that a "*matter*" is to be identified by reference to claims and all issues that could be raised in defence of those claims. To the contrary, it is well-accepted that a "*matter*" within the meaning of s 7(2) of the IAA need not be coextensive with the entire subject matter in controversy or all of the claims and defences made in a proceeding, and an issue raised may be a discrete "*matter*" to be referred to arbitration even if its resolution depends upon findings made on other "*matters*" in other fora: see *Tanning Research* (1990) 169 CLR 332 at 350 (Deane and Gaudron JJ); *Flint Ink* (2014) 44 VR 64 at [34] and [37] (Warren CJ) and [93] (Nettle JA).

18. The applicants seek to overcome these authorities by observing that there must be "*two sides*" to a controversy: AS[15]. That is obvious, but it only means that, for there to be a controversy capable of discrete settlement, there must be a dispute. It does not mean that everything one party might raise in response to another party's claim falls on the other side of the same coin or is the one "*matter*". If what is raised by the other party is itself a right or liability in dispute which is susceptible of settlement as a discrete controversy and covered by an arbitration agreement, it is itself a "*matter*" capable of being referred to arbitration, even though the claim to which it responds may fall outside the arbitration

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[1] ***Tanning Research*** *Laboratories Inc v O'Brien* (1990) 169 CLR 332 at 351 (Deane and Gaudron JJ); ***Flint Ink*** *NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64 at [31] (Warren CJ) and [84]-[89] (Nettle JA).

agreement. This, after-all, was the result reached in several appellate decisions, including in *Tanning Research* (1990) 169 CLR 332, *Flint Ink* (2014) 44 VR 64, *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (2020) 55 WAR 435 and *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* (2022) 59 WAR 316.

19. In *Tanning Research*, the claim was whether the liquidator should admit the proof of a debt in a winding up of a company, which was not something that was arbitrable: see at 350-51. One of the issues to be addressed in resolving that claim, however, was whether the alleged debt of the company was even owing under the relevant agreement. That, the High Court found, was a dispute capable of settlement as a discrete controversy and was required to be arbitrated due to the presence of an arbitration agreement in the contract, even though it was relevant to, if not determinative of, the broader non-arbitrable controversy concerning admission of proof of debts: see at 352. The arbitrable matter concerning the existence of the debt was required to be referred to arbitration, even though it formed part of the larger, non-arbitrable, matter concerning admission to proof.

20. In *Flint Ink*, only the dispute concerning whether Flint Ink owed and breached duties of care to Huhtamaki NZ was referred to arbitration as a distinct "*matter*", leaving the other disputes as to Flint Ink's liability to Huhtamaki Australia in the courts unless the parties agreed to also bring those into the arbitration: at [34] and [37] per Warren CJ and [93] and [117] per Nettle JA. This was so notwithstanding that the defences to Huhtamaki Australia's claims included that Flink Ink owed no relevant liability to Huhtamaki NZ, which would be resolved in arbitration. On the applicant's approach in these proceedings, the Victorian Court of Appeal must have been wrong and ought to have found that everything was part of the same "*interlocking matter*".

21. And in *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (2020) 55 WAR 435 at [120]-[126], [171] and [192]-[197] (Quinlan CJ, Beech and Vaughan JJA agreeing) and *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* (2022) 59 WAR 316 at [153]-[154] and [174] (Quinlan CJ and Beech JA), the Western Australian Court of Appeal on two occasions found that counterclaims or replies relating to who held the better title to tenements as between Hancock Prospecting and Gina Rinerhart's children raised "*matters*" capable of settlement by arbitration and had to be stayed, even though they were raised as part of a "*four way dispute*" ((2020) 55 WAR 435 at [194]) as to ownership of the same tenements. On the applicants' approach, the Court of Appeal must also have been wrong, as the counterclaims and replies that were stayed responded to and were capable of

affecting claims that remained in Court.

22. Contrary to the applicants' contentions, the well-recognised position is that interdependencies between issues arising in a proceeding, including whether an issue raised is a defence to a claim, do not make the issues all part of the one and same "*matter*". Rather, the correct approach is to identify whether a particular controversy raised, which falls within the scope of an arbitration agreement, concerns rights or liabilities that are capable of settlement as a discrete controversy. If it does, s 7(2) of the IAA requires that controversy to be resolved in arbitration upon the application of any party.

23. This approach also gives effect to the purpose of s 7 of the IAA, being to enforce the agreement of parties to resolve certain controversies between them in arbitration, thereby furthering the international policy in favour of promoting and encouraging arbitration.[2] The referral of "*matters*" to arbitration ensures that those controversies that the parties agreed to arbitrate will be arbitrated, even though their broader dispute may include controversies that go beyond their agreement. It also ensures that *only* those controversies which the parties had agreed to arbitrate are referred, rather than subjecting parties to arbitrate other controversies that they have not agreed to send to an arbitrator.[3]

24. As the primary judge correctly observed (J[106]), the Cross-Claim raises alleged rights, both contractual and equitable, that are distinct from those in issue on Elecnor's claims. Even if the resolution of the dispute over those rights may affect aspects of some of Elecnor's claims, that does not change the fact that the resolution of the rights and liabilities raised on the Cross-Claim can be reached through a separate arbitration. An arbitral tribunal can readily resolve whether cl 13.2 was engaged, whether on its terms the applicants are entitled to contribution from Elecnor or whether any of the various defences that Elecnor may raise precludes any liability on its part. The Tribunal can award final declaratory relief concerning the findings it makes on these issues, and subject to the Court resolving the question of the effect of the DOCA, award further final relief in the form of damages to the relevant applicant, if found to be appropriate. This demonstrates the extent to which the claim raised in the Cross-Claim concerns a discrete controversy capable of settlement by arbitration, and is therefore of itself a "*matter*".

25. It is also not to the point that an aspect of Elecnor's claim for specific performance –

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2 See *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of Federal Court of Australia* (2013) 251 CLR 533; [2013] HCA 5 at [45]-[47] (Hayne, Crennan, Kiefel and Bell JJ).

3 See ibid at [29] (French CJ and Gageler J).

whether it was ready and willing to perform – might have been "*carve[d] out*" (AS[15]) from the claim in the Court because of the effect of the arbitration agreement. Even if findings on what was carved out may affect whether Elecnor is ready and willing to perform, it does not affect the identification of the distinct "*matters*": J[107]. The applicants' claim of a breach of cl 13.2 is still a claim that is disputed and can be resolved through findings of fact and law made by an arbitral tribunal in a final award.

26. The applicants' approach also does not find support from the Full Court's reasons in *Hancock Prospecting* at [157]: cf AS[20]. There, the Full Court warned against an "*overly fine dissection of different 'disputes' within a wide-ranging and interlocking controversy*" in the context of arguments that sought to excise "*matters*" from the scope of a broad arbitration agreement. The Court was warning against excising disputes from an otherwise broad arbitration agreement contrary to the policy of the IAA. It would similarly be contrary to that policy to take an overly broad view of a "*matter*" so as to bring plainly arbitrable disputes within non-arbitrable disputes and thereby avoid the effect of the arbitration agreement. That is what the applicants seek to do here, and it should be rejected.

27. The *third* flaw in the applicants' argument is the erroneous premise that, in seeking specific performance and pleading it was ready and willing, Elecnor put in issue any dispute concerning cl 13.2 of the JV Deed that might be raised by the applicants by way of cross-claim: AS[14], [17]-[18] and [22]-[23]. That is flawed on a factual level, because as summarised in Part B above, when Elecnor commenced the proceedings and pleaded its readiness and willingness, any claim by the applicants under cl 13.2 had not been foreshadowed nor did it then exist, because no demand had been made. In pleading its readiness and willingness, Elecnor was only alleging that, at the time of commencing proceedings, it was ready and willing to perform its obligations relevant to cl 21.3: see *Mehmet v Benson* (1965) 113 CLR 295 at 315 (Windeyer J). Elecnor said nothing as to its readiness and willingness to perform other unspecified and unknown contractual obligations that might arise in the future.

28. The argument is also flawed on a legal level. A plea of readiness and willingness applies only to obligations that are essential to that which is sought to be enforced.[4] All that Elecnor sought to be enforced was a distinct and independent obligation in cl 21.3 of the JV Deed

[4] *Mehmet v Benson* (1965) 113 CLR 295 at 307-08 (Barwick CJ); *Green v Somerville* (1979) 141 CLR 594 at 608-09 (Mason J, Murphy and Aikin JJ agreeing); *Bahr v Nicolay (No 2)* (1988) 164 CLR 604 at 619-20 (Mason CJ and Dawson J).

concerned with a process of compulsory acquisition of Clough's interest and the expert determination procedure in Sched 3 to resolve a dispute as to the value of that interest: WF257. These independent obligations are not essential to, connected with or conditional upon any obligations in cl 13.2 of the JV Deed. By analogy, a tenant who was in breach of a covenant in a lease was still entitled to seek specific performance of an option to buy-out the reversion in the same lease when one was not a condition precedent to the other: see *Green v Low* (1856) 22 Beav 625 at 627 [52 ER 1249 at 1250]. Similarly, a failure of a purchaser to pay interest due under the contract was not relevant to the purchaser's claim for specific performance of the obligation to transfer, as the latter obligation was independent from the former: *Green v Somerville* (1979) 141 CLR 594 at 608-09.[5]

29. Further, merely because Elecnor disputes that it is liable to make any payment under cl 13.2 of the JV Deed does not thereby make it unready, unwilling or unable to perform, even if Elecnor is proven to be mistaken in its view: see *Rawson v Hobbs* (1961) 107 CLR 466 at 481 (Dixon J). It is only if Elecnor is found liable to pay and continues to refuse to make payment that any argument could be put (if at all) that Elecnor is not ready, willing or able to perform. The Securities Recovery Claim has no relevance to the issues pleaded by Elecnor unless and until that Claim has been resolved against Elecnor. Because of the arbitration agreement, the manner in which that Claim is resolved is through arbitration only, and thereafter may it then affect Elecnor's claims in these proceedings. This may have the result, as the primary judge accepted (J[107]), that the nature or availability of any specific performance may need to first await the arbitration of the Securities Recovery Claim. It does not have the result that, by pleading readiness and willingness, the Securities Recovery Claim was brought into these proceedings as part of what the primary judge called the "*Clause 21.3 Matter*".

30. This also disposes of the applicants' complaint of the primary judge referring off their claim "*while allowing Elecnor to litigate its side of the 'matter' in full before any arbitration is determined*": AS[19]. That is not what the primary judge found. The primary judge found, with respect correctly, that the claim raised by the applicants is capable of settlement by arbitration and must therefore be arbitrated even if its resolution may become relevant to the question of specific performance: J[107]. The extent to which Elecnor's claims can be litigated "*in full*" was not resolved, nor does it need to be resolved. *Tanning*

[5] See also *Gibson v Goldsmid* (1854) 5 De GM & G 757 at 768 [ER 1064 at 1068-9] (a partner was entitled to specific performance of an obligation of another partner to assign interests, when that obligation was independent of the plaintiff's obligation to indemnify, which had been breached).

Research, *Flint Ink* and the *Hancock Prospecting* cases all concerned situations in which controversies that were referred to arbitration might affect the outcome of controversies remaining in the courts or vice-versa. The extent to which any controversies should or can be heard and resolved pending resolution of other controversies are case management issues to be addressed in the ongoing proceedings in the Court.

(2) Appeal grounds 2 and 3 and NOC ground 1 – arbitrability (AS[26]-[34])

31. Draft appeal grounds 2 and 3 are part of the applicants' attack on the primary judge's finding that Elecnor did not "*waive*" the arbitration agreement. They contend that the primary judge erred in finding that Elecnor's proceedings raised a non-arbitrable matter (see J[110]) and in further finding that it was questionable whether the Trustees were parties to the arbitration agreement as persons claiming "*through or under*" Clough (within the meaning of s 7(4) of the IAA) in respect of the matters raised on Elecnor's claims: J[123]. The draft Notice of Contention (**NOC**) ground 1, in turn, contends that his Honour ought to have gone further and found that the Trustees were *not* claiming through or under Clough in respect of what the primary judge called the "*Clause 21.3 Matter*".

32. The "*Clause 21.3 Matter*" involves two disputes. The first concerns whether Elecnor's rights under cl 21.3 of the JV Deed are incapable of being enforced by reason of the DOCA: see J[40], [42](1) and [45]; CLS (WF261) at [8]-[11], [20]-[27] and [30]; CLR (WF270) at [2](a), [7](b), [8]-[11], [18](d), [24]-[27], [28](c)-(e), [29](b) and [30]. This claim is concerned principally with the effect of the DOCA (which does not contain an arbitration agreement), whether provisions of both the JV Deed and the EPC Contract (which also does not contain an arbitration agreement) affect the operation of the DOCA or the Trustees' rights thereunder, and whether Elecnor's exercise of its rights under cl 21.3 of the JV Deed comprised a "*claim*" within the meaning of s 444D(1) of the *Corporations Act* that was extinguished and released by the DOCA or otherwise affected by s 451E of that Act: see J[110]. Central to the resolution of this claim is the meaning, operation and effect of the DOCA, including in light of provisions of the *Corporations Act*.

33. The second dispute, which depends upon the outcome of the first, is whether specific performance of the JV Deed should be ordered so as to require the applicants (or one or more of them) to follow the procedure envisaged by cl 21.3 of the JV Deed, including whether Clough committed defaults that enlivened cl 21.3: see J[30]-[38] and [42](2)-(4); CLS [7], [12]-[19], [31]-[33]; CLR [7]-[18], [28](a)-(b), [29](b)-(c) and [31]-[32].

34. The dispute concerning the effect of the DOCA was properly found by the primary judge

to not merely involve the resolution of a private dispute between the applicants and Elecnor, but public interest questions as to the efficacy of the DOCA and provisions of the *Corporations Act* that affect the rights of other creditors: J[110]. The subject matter may be rights under the JV Deed and to that extent the dispute falls within the scope of the broadly drafted arbitration agreement, but the dispute turns on the application and effect of the DOCA itself, including in light of ss 444D and 451E of the *Corporations Act*.

35. Understood in this light, the DOCA dispute does not solely concern an *inter partes* dispute in respect of pre-administration rights and obligations (cf *Tanning Research* (1990) 169 CLR 332 at 342-43), nor does it raise only indirect consequences for other creditors: cf AS[30]. It concerns the operation and effect of a DOCA that, through s 444D of the *Corporations Act*, binds all creditors of the company, none of whom (apart from Elecnor) are parties to the arbitration agreement in the JV Deed. All creditors have an interest in the construction and effect of a Deed to which they are bound and that may then affect the *res* of the trust of which they are beneficiaries. A deed of company arrangement is a "*public instrument*" to which private contractual principles of construction are not always applicable,[6] and subject to the overriding supervision of the courts.[7] It carries similar, if not the same, features as the class of "*insolvency proceedings*" that courts have long found not to be arbitrable.[8] In any event, the question need not be decided on a final basis: the circumstance that real doubts might be held about the arbitrability of the DOCA dispute would be sufficient explanation for Elecnor's decision to proceed in Court to dispel the suggestion of any "*waiver*" (see below).

36. Contrary to AS[30], these features of the DOCA dispute do not arise in the Securities Recovery Claim. The latter matter involves only the interpretation and effect of the JV Deed to which only Clough and Elecnor are parties. To the extent the resolution of these issues affects the position of the Trustees and the creditors' trust, that is only to the extent of Clough's rights under the JV Deed. Unlike the DOCA dispute, the resolution of the Securities Recovery Claim does not involve any question of construing or applying a public instrument binding on a number of non-parties to the arbitration agreement.

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6 See *Goldus Pty Ltd v Cummins (No 4)* [2021] FCA 1095 at [42] and [183] (Colvin J).

7 See *Mighty River International Ltd v Hughes* (2018) 265 CLR 480 at [32]-[33] (Kiefel CJ and Edelman J).

8 See *Tesseract International Pty Ltd v Pascale Construction Pty Ltd* (2024) 98 ALJR 880 at [271]-[272] (Steward J) and [341] (Jagot and Beech-Jones JJ); *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452 at [124]-[128] (Foster J); *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 at [63]-[65] (Hammerschlag J); *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21 at [45]-[48].

37. In any event, as raised by NOC ground 1, when the nature of Elecnor's claims is properly identified, it is also clear that the Trustees do not claim "*through or under*" Clough within the meaning of s 7(4) of the IAA in respect of at least the DOCA dispute. Contrary to AS[32], this question does not turn on the meaning of the Trustees' statement that they do not "*adopt*" the JV Deed (albeit that justifiably would call into doubt whether they would have considered themselves bound by the arbitration agreement: see J[123]). Rather, it turns on whether the Trustees, as an essential element of their defence in the DOCA dispute, rely upon a right or interest that was vested in or exercisable by Clough,[9] or take a stand upon a ground that is available to Clough under the JV Deed so as to stand in the same position as Clough.[10]

38. The applicants' submissions at AS[33]-[34] miss the point. The critical point is that the DOCA dispute turns on whether the effect of the DOCA, coupled with provisions of the *Corporations Act*, preclude Elecnor from acquiring Clough's interest in the joint venture through cl 21.3 of the JV Deed. While provisions of the JV Deed, including prohibitions on assignment, may be relevant to the DOCA dispute, the Trustees do not seek to rely on any rights or defences that had ever been available to Clough to resist cl 21.3 of the JV Deed; they rely upon the terms and effect of the DOCA and the *Corporations Act* to resist the claim. To the extent the Trustees seek to engage with the terms of the JV Deed, that is only to refute Elecnor's reliance on them as having an effect on the DOCA. The grounds on which the Trustees stand are as trustees of the creditors' trust, as created through the creditors' trust deed consequential upon the DOCA. To extend the application of s 7(4) of the IAA to this circumstance would extend the reach of arbitration agreements well beyond any concept of party autonomy or consent, concepts that are fundamental to the existence and process of arbitration.

39. This is in contrast to the position of the Trustees in the Securities Recovery Claim: cf AS[34]. On that claim, the Trustees are clearly claiming "*through or under*" Clough as they seek to rely on alleged rights of Clough's under the provisions of the JV Deed. The DOCA is only of relevance to the Cross-Claim in identifying who, as between Clough or the Trustees, may be entitled to receive payment from Elecnor if an arbitral tribunal were to find in their favour. But that issue is not the subject of the referral to arbitration, being

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[9] Cf *Tanning Research* (1990) 169 CLR 332 at 342; ***Rinehart*** *v Hancock Prospecting Pty Ltd* (2019) 267 CLR 514 at [66].

[10] *Rinehart* (2019) 267 CLR 514 at [73].

instead part of the DOCA dispute that is to remain with the Court: WF252.

40. It follows that, in respect of the dispute concerning the effect of the DOCA, there are parties to that dispute who are not parties to the arbitration agreement and that dispute is not then arbitrable. In any event, even if this Court were to find that the Trustees were claiming "*through or under*" Clough within the meaning of s 7(4) of the IAA and that the DOCA dispute was arbitrable, it does not follow that the primary judge then erred in finding that the question of "*through or under*" was "*in issue*" at the time Elecnor commenced these proceedings: J[123]. This, in turn, is relevant to the question of whether Elecnor abandoned, repudiated or "*waived*" the arbitration agreement.

41. The primary judge's finding was supported by the fact that the Trustees had previously disavowed any adoption of the JV Deed on their part, which his Honour correctly interpreted as also putting in issue whether the Trustees were bound by the arbitration agreement: see J[41] and [123]. The applicants' suggestion that the Trustees were simply confirming that they were not accepting personal liability (AS[32]) seeks to ascribe meaning well beyond the words used and ignores that the non-adoption of the JV Deed extended expressly to the Trustees "*in [their] capacity as either administrators or as trustees of the Creditors' Trust*": see WF559. The question of the status of the Trustees as parties to the arbitration agreement was also clearly "*in issue*" because the very question was, and remains (cf AS[33]), in dispute between the parties: J[121].

(3) Appeal ground 4 and NOC grounds 2 and 3 – "waiver" (AS[21]-[25] and [35]-[49])

i. <u>The threshold relevance of ground 4</u>

42. Appeal ground 4 falls away if appeal ground 2 is rejected (or notice of contention ground 1 is upheld), as it follows that there could not have been a repudiation, abandonment or "*waiver*" in bringing proceedings on the DOCA dispute if that matter fell outside the reach of the arbitration agreement: see AS[37].

43. Elsewhere in their submissions the applicants contend that this is not so because Elecnor sought to litigate both the DOCA dispute and the claim for specific performance, the latter being a matter capable of settlement by arbitration: AS[25]. How this affects the result on "*waiver*" is unexplained. The "*waiver*" question ultimately turns on what inferences the Court is prepared to draw from Elecnor's conduct of commencing in Court. When Elecnor commenced proceedings in Court, the principal dispute it sought to have resolved concerned the effect of the DOCA; the remedy of specific performance was subsidiary and did not (at that stage) raise any substantial independent issues. If the DOCA dispute was

not arbitrable, or there were reasons to doubt its arbitrability, the Court would not readily infer that Elecnor's conduct manifested an intention to abandon any reliance on the arbitration clause in the future in respect of any other claims the applicants might raise.

44. In any event, the primary judge found that the DOCA dispute and specific performance claim were the one "*Clause 21.3 Matter*" (J[102]) and that finding is not challenged by the applicants. If the DOCA dispute is non-arbitrable, then the entire "*Clause 21.3 Matter*" is also non-arbitrable and no "*waiver*" could arise from Elecnor litigating that matter.

ii. NOC ground 2

45. Draft appeal ground 4 also fails on the proper construction of the arbitration agreement (NOC ground 2), because even if the "*Clause 21.3 Matter*" (or matters contained within) was subject to the arbitration agreement, Elecnor was not in breach of that clause by commencing these proceedings. Clause 23.3 of the JV Deed, properly construed, only mandates arbitration when one of the parties so requires, and the applicants did not require (and do not now seek) arbitration of these matters. That is the meaning and effect of the word "*may*" in cl 23.3.

46. An arbitration agreement is to be construed according to the usual principles of contractual construction: *Inghams Enterprises Pty Ltd v Hannigan* [2020] NSWCA 82 at [53]-[54] (Bell P). Consistent with those principles, the fact that a court has construed a similarly drafted clause in one way does not determine the meaning of a clause in a different contract. While some judges have construed arbitration agreements that adopt the term "*may*" as mandating arbitration if a dispute is to proceed (cf AS[38] and [42]), others have construed similar clauses as allowing parties to litigate unless one of them requires arbitration.[11]

47. Here, cl 23.3 is to be construed against two important matters of context. The first is that the clause itself envisages the parties agreeing to other forms of dispute resolution (cl 23.3(a)) and provides for circumstances in which the parties can litigate certain matters instead: cl 23.3(g) (WF341). The concept of the parties resolving their dispute other than through arbitration is therefore not foreign to the clause.

48. The second important matter of context is that the JV Deed was entered into for purposes of the parties pursuing the project the subject of the separate EPC Contract with Transgrid. That contract does not contain an arbitration agreement. At the time of agreeing to the JV

[11] See *ABB Power Plants Ltd v Electricity Commission (NSW) (t/as Pacific Power)* (1995) 35 NSWLR 596 at 624 (Cole J); *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603 at [20]-[30]; *Anzen Ltd v Hermes One Ltd* [2016] UKPC 1 at [33].

Deed, it must have been in the contemplation of the parties that disputes involving the same subject matter could arise under both the JV Deed and the EPC Contract. In those circumstances, the parties could conceivably (if not likely) prefer to have the disputes all resolved in the one forum: cf *Qantas Airways Ltd v Rohrlach* (2021) 304 IR 218 at [64]-[65] (Bell P).

49. This scenario is accommodated expressly through cl 23.3(a), which permits the parties to agree an alternative dispute resolution procedure to arbitration, and is reinforced through the use of the permissive term, "*may*". The applicants accept that cl 23.3(a) includes litigation and that the primary judge erred in considering otherwise (J[80]; AS[40]). There is, in turn, no reason why an agreement on alternative dispute resolution procedures cannot be inferred by conduct.[12] After-all, that has occurred here with respect to what the primary judge called the "*Clause 21.3 Matter*". Before commencing proceedings, Elecnor foreshadowed to the applicants that it would be bringing this claim in court and the applicants did not then insist upon any rights to arbitrate: WF561-62. After Elecnor then commenced the proceedings, the applicants continued to not raise any rights to arbitrate, but instead have sought to defend the claims on their merits. Their conduct infers an agreement to litigate the claims the subject of the "*Clause 21.3 Matter*".

50. This construction of cl 23.3 also does not invite commercially inconvenient results: cf AS[41] and J[80]. Obviously, a party who commences proceedings without first ascertaining if the other party will insist upon arbitration runs the risk of bearing the costs of any aborted judicial proceedings. But the possibility of such a circumstance does not control the construction of the clause that permitted the parties, if neither wished to arbitrate, to resolve their dispute through litigation instead. So long as it remains open to the parties to agree to litigate, which is at any point before the other insists upon arbitration, it cannot be in breach of cl 23.3 for a party to commence proceedings on a matter.

51. It is also not the case that reading the word "*may*" as bearing its ordinary permissive meaning then allows one party to unilaterally bind the other party to litigation: cf AS[39]. The word "*may*" and the option to agree in cl 23.3(a) mean that litigation can occur if *both* parties agree. "*May*" gives each party the right to insist upon arbitration, such that the election to arbitrate by one binds the other, but not the election by one to litigate. A breach of cl 23.3 only arises if one party seeks to continue litigating a "*matter*" after the other party insists upon arbitration of that "*matter*".

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[12] See *Brambles Holdings Ltd v Bathurst City Council* (2001) 53 NSWLR 153 at [77]-[81] (Heydon JA).

52. It follows that Elecnor's commencing of these proceedings, which occurred without the applicants having ever insisted on arbitration, was not in breach of cl 23.3. That being so, there could be no repudiation, abandonment or "*waiver*" by Elecnor of its rights to arbitrate other matters that were not raised on its claims. The submissions that follow are made only in the event that this construction of cl 23.3 is rejected.

iii. No "waiver" by Elecnor

53. The applicants' submissions on "*waiver*" (AS[21]-[25]) are, with respect, confused. Nowhere does the applicant identify what is meant by "*waiver*" or how it differs from the separate arguments on repudiation and abandonment advanced by the applicants elsewhere: see AS[43]-[49]. "*Waiver*" is a "*vague or imprecise term is used in many senses*": ***Zhang*** *v Shanghai Wool and Jute Textile Co Ltd* (2006) 201 FLR 178 at [14]. It may include a plea of unilateral release or abandonment based upon general doctrines of unfairness or approbation and reprobation, or it may be used in senses synonymous with election, estoppel or variation of contract: *Agricultural and Rural Finance Pty Ltd v Gardiner* (2008) 238 CLR 570 at [46] and [51]-[54] (Gummow, Hayne and Kiefel JJ). The applicants' case on abandonment is addressed below, and they otherwise do not seek to rely upon any principle of election, estoppel or variation of contract. What precisely the applicants therefore contend by arguing that Elecnor "*waived*" the arbitration agreement (AS[22]-[24]) is not clearly spelled out.

54. In any event, at its core a "*waiver*" in any sense of the term requires an awareness of: the facts giving rise to the rights which are being foregone; the right to forego those rights; and the connection between the two: *Zhang* (2006) 201 FLR 178 at [14].[13] Here, and contrary to AS[22]-[24], merely by seeking specific performance and alleging readiness and willingness to perform does not indicate any awareness on Elecnor's part, when commencing the proceedings, of a claim that *might* be brought by the applicants, which claim did not then exist nor had it been foreshadowed. Without knowledge of that claim, Elecnor could not also be aware that it was foregoing its rights to arbitrate that claim: see J[17], [42]-[43] and [129]; WF564-66. The primary judge was correct to find no such "*waiver*" in these circumstances: J[129].

55. The applicants seek to overcome this conclusion by contending that all of which a party

[13] See also *Commonwealth v Verwayen* (1990) 170 CLR 394 at 423-24 (Brennan J), 473 (Toohey J), 482 (Gaudron J) and 497 (McHugh J); Wilken and Villiers, *The Law of Waiver, Variation and Estoppel* (3rd ed, 2012) at [4.45].

needs to be aware is the general "*availability of arbitration*": AS[23]. Reliance is placed on the decision of Austin J in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896, but there the relevant "*waiver*" was in the context of responding to proceedings that had already been commenced and not then seeking to refer those claims to arbitration. Plainly, the relevant person alleged to have "*waived*" the arbitration agreement was already aware of the nature of the claims, such that their additional knowledge of the availability of a right to arbitrate would suffice for any "*waiver*". Here, there were no materials before the primary judge to suggest that Elecnor had any knowledge of the nature of the Securities Recovery Claim, which did not even exist at the time Elecnor commenced these proceedings. It would have been absurd for the primary judge to have found that Elecnor knowingly gave up a right to arbitrate claims about which it had no knowledge.

56. The applicants' submissions on "*waiver*" are also premised on an acceptance that there was only one "*interlocking matter*" raised on Elecnor's claim and their Cross-Claim: see AS[24]-[25]. It is on that basis that the applicants then appear to contend that Elecnor "*irrevocably abandoned*" (perhaps suggesting by "*waiver*" they simply mean abandonment) pursuit of the arbitration of this all-encompassing "*matter*". If their appeal on ground 1 is rejected, then it would follow that their submissions on "*waiver*" also fall away. Any "*waiver*" by Elecnor in respect of one "*matter*" does not affect the operation of the arbitration agreement in respect of any other matters.[14]

iv. No repudiation or abandonment and NOC ground 3 (AS[43]-[49])

57. As part of appeal ground 4, the applicants also contend that the primary judge erred in failing to find that Elecnor repudiated the arbitration agreement: J[128]. Obviously, if appeal grounds 2 and 3 are rejected, or NOC ground 2 is upheld, this part of appeal ground 4 falls away as there was no breach by Elecnor in commencing proceedings or, if there was, by reason of the uncertainties as to arbitrability or the position of the Trustees, it was not a breach that objectively evinced any repudiatory intent: J[128].

58. Even if the applicants overcome these obstacles, they still face the problem that a breach of an arbitration agreement, by bringing some matters before the Court, does not without more evince any objective intention to no longer be bound by the arbitration agreement. The principles of repudiation are not in dispute (cf AS[43]-[45]), and they include that

[14] See *Bakri Navigation Company Ltd v 'Golden Glory' Glorious Shipping SA* (1991) 217 ALR 152 at 168 (Gummow J); *Ahmed v Uddin* [2005] EWCA Civ 883 at [19]-[21].

repudiation is "*a serious matter and is not to be lightly inferred*".[15] It requires clear and unequivocal conduct that demonstrates an intention of a party to no longer be bound by the arbitration agreement in respect of any and all disputes.[16] Instances where courts have found a party to have repudiated the arbitration agreement are limited to where the conduct of the party, including "*in the light of pre-writ correspondence*", made it clear that it considered itself not bound by the arbitration agreement at all.[17]

59. Here, the fact that Elecnor's claims, if successful, may bring the joint venture to an end does not indicate that it intended to no longer be bound by the arbitration agreement: cf AS[46]. For a start, that offends the very principle of separability that the applicants call in aid on their repudiation argument: AS[45]. The termination of the JV Deed or joint venture would not terminate the separate arbitration agreement.

60. Moreover, the applicants fail to grapple with the circumstances in which Elecnor brought its claims, being claims which were of questionable arbitrability for the reasons addressed in Part C(2) above, against non-signatories to the arbitration agreement and in circumstances where those non-signatories disavowed any adoption of the JV Deed on their part in all of their capacities: J[41]. A party commencing proceedings in these circumstances, even if the claims are in fact covered by the arbitration agreement, does not objectively evince any intention to no longer be bound by the arbitration agreement for all disputes in the future.

61. For the same reasons, the primary judge's finding that Elecnor's conduct did not amount to abandonment (J[130]) was also correct: cf AS[49]. An abandonment similarly requires an unequivocal intention to forego arbitration of the claims capable of settlement by arbitration, with knowledge of what is being foregone.[18] Seeking to litigate Elecnor's claims the subject of the "*Clause 21.3 Matter*" does not suggest an unequivocal intention to forego arbitration for any other claims, especially claims of which Elecnor had no

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[15] *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 17 at 32 (Mason J); see also *Shevill v Builders Licensing Board* (1982) 149 CLR 620 at 633 (Wilson J).

[16] See *Rederi Kommanditselskaabet Merc-Scandia IV v Couniniotis SA* [1980] 2 Lloyds Rep 183 at 185 (Lloyd J); *Armada Balnaves Pte Ltd v Woodside Energy Julimar Pty Ltd* [2022] WASCA 69 at [511] and [515]; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [62] (Allsop J); *BEA Hotels NV v Bellway LLC* [2007] 2 Lloyd's Rep 493 at [13]-[14] (Cooke J); *Russell on Arbitration* (24th ed, 2015) at [2-137]; Mustill and Boyd, *Commercial and Investor State Arbitration* (3rd ed, 2024) at [3.156]; Blackaby et al, *Redfern and Hunter on International Arbitration* (7th ed, 2023) at [2.229].

[17] See, e.g., *Downing v Al Tameer Establishment* [2002] EWCA Civ 721 at [31]-[32].

[18] See *Zhang* (2006) 201 FLR 178 at [14]-[16]; *Hooper Bailie Associated Ltd v Natcon Group Pty Ltd* (1992) 28 NSWLR 194 at 211 (Giles J).

knowledge and did not exist when the proceedings were commenced.

(4) Appeal ground 5 – the discretionary stay (AS[53]-[56])

62. Proposed appeal ground 5 requires identifying a *House v The King* (1936) 55 CLR 499 error. The matters raised at AS[53]-[55] do not disclose error.

63. As to AS[54], the declaration sought by Elecnor concerns the effect of the DOCA on its rights under cl 21.3 of the JV Deed. The matters raised by the applicants in their CLR at [8](c)-(e) are not the subject of Elecnor's declaration, so no issue of hypothetical disputes arises. To the extent those matters have any relevance, they are to that part of the applicants' Cross-Claim concerned with whether the DOCA transferred the rights of Clough to the Trustees, which was not stayed: WF252.

64. As to AS[55], the primary judge's reasoning was not internally inconsistent. His Honour recognised that any relief in the nature of specific performance may have to await findings on the Securities Recovery Claim in the arbitration: J[107]. His Honour's finding at J[135] was that the resolution of the DOCA dispute did not depend upon the resolution of the Securities Recovery Claim in the arbitration. That is plainly correct, because the resolution of the dispute concerning cl 13.2 of the JV Deed has no relevance at all to the question of whether the DOCA or provisions of the *Corporations Act* preclude Elecnor from pursuing its rights under cl 21.3 of the JV Deed.

65. The applicants' suggestion that the Securities Recovery Claim should be resolved first (AS[56]) is also nonsensical. As the applicants recognise elsewhere (AS[33]), whether or not it is the Trustees or Clough to whom any rights to payment under cl 13.2 enures requires resolution of the dispute about the effect of the DOCA. If the arbitral tribunal finds that Elecnor is liable to make a payment under cl 13.2, it will not know to whom that payment is to be made until the Court resolves the DOCA dispute (the DOCA dispute, as it was raised in the Cross-Claim at [15], was not referred to arbitration). On any view, accordingly, at least the DOCA dispute must be resolved by the Court first, and there is no warrant for then staying the Court proceedings. As to whether the claim for specific performance can be resolved before the resolution of the arbitration, that is a case management issue that the primary judge did not yet need to determine.

D. THE DRAFT NOTICE OF CROSS-APPEAL

66. While the primary judge was correct to reject the applicants' approach to the "*matter*" question, his Honour erred in failing to find that the Bad Faith Breach Contention also

raised a discrete controversy capable of settlement by arbitration and was therefore subject to the mandatory stay in s 7(2) of the IAA: cf J[105]. This finding overlooked that the Bad Faith Breach Contention raises separate factual allegations concerning alleged breaches of separate clauses of the JV Deed: J[46]; CLR [7(b)(iv)-(vi)] and [29(d)]. There is no reason why these issues cannot be resolved as a discrete controversy in arbitration, with a final award granting relief on the claims made by the applicants by way of declarations or other orders.

67. The arguments raised at AS[50]-[52] suffer from the same defects as the applicants' submissions addressed in Part C(1). That the Bad Faith Breach Contention is a defence raised to the claim for specific performance does not make it part of the same "*matter*". And the Bad Faith Breach Contention sits in a very different position to other positive defences raised by the applicants, such as their reliance on s 451E of the *Corporations Act*: cf AS[52]. The Trustees do not claim "*through or under*" Clough in relying upon s 451E, but they do so claim in contending that Elecnor breached various provisions of the JV Deed with Clough, a controversy that raises rights and liabilities capable of discrete resolution by an arbitral tribunal.

E. CONCLUSION

68. The application for leave to appeal (and/or the appeal) should therefore be dismissed with costs. The application for leave to cross-appeal, and the cross-appeal, should be allowed with orders made in the terms sought in the draft Notice of Cross-Appeal.

30 October 2025

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CERTIFICATION OF SUITABILITY FOR PUBLICATION

COURT DETAILS	
Court	Supreme Court of New South Wales, Court of Appeal
Registry	Sydney
Case number	2025/00273969
TITLE OF PROCEEDINGS	
First applicant	**Clough Projects Australia Pty Ltd** (ACN 109 444 215)
Number of applicants	3
Respondent	**Elecnor Australia Pty Ltd** (ACN 168 435 658)
PROCEEDINGS IN THE COURT BELOW	
Title below	Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd & Ors
Court below	Supreme Court of New South Wales
Case number below	2024/00467526
FILING DETAILS	
Filed for	**Elecnor Australia Pty Ltd**, Respondent
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CERTIFICATION

I, Kon Nakousis, solicitor for the Respondent, certify pursuant to paragraphs 27 and 28 of Practice Note SC CA 01 – Court of Appeal that the Respondent's Submissions filed 30 October 2025 are suitable for publication.

SIGNATURE

#Signature of legal representative	
Capacity	Solicitor for the Respondent
Date of signature	30 October 2025