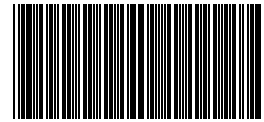




Filed: 14 October 2025 6:09 PM



D00028QQIS

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	ELEC NOR AUSTRALIA PTY LTD ACN 168435658

FILING DETAILS

Filed for	CLOUGH PROJECTS AUSTRALIA PTY LTD, Applicant 1 Salvatore Algeri, Applicant 2 David Orr, Applicant 3
-----------	---

Legal representative	Justin Vaatstra
Legal representative reference	
Telephone	

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 (2025.10.14 Clough - Appeal Submissions .pdf)

[attach.]

Clough Projects Australia Pty Ltd & Ors v Elecnor Australia Pty Ltd

Applicants' Submissions

A Introduction

1. The respondent (**Elecnor**) commenced a proceeding in this Court seeking to enforce a compulsory acquisition process in a joint venture agreement with the first applicant (**Clough**), whose assets have been transferred to a creditors' trust administered by the second and third applicants (the **Trustees**) (see **Section B** below). Clough and the Trustees have disputed that Elecnor is ready and willing to perform on its part, based on a failure to pay some \$55 million in contribution to a call on securities, and cross-claimed for that sum.
2. The primary judge considered himself bound to stay the dispute as to contribution in favour of arbitration at Elecnor's motion but declined to stay any of Elecnor's claims pending the arbitration: *Elecnor Australia Pty Ltd v Clough Projects Australia Pty Ltd* [2025] NSWSC 610 (**J**). His Honour erred in doing so for the following reasons, which address the grounds in the draft notices of appeal (**NOA**), contention (**NOC**) and cross-appeal (**NOXA**) in a logical order:
 - (a) The dispute as to contribution was not a separate "matter" but rather an issue within the "matter" raised by Elecnor's claim for specific performance (NOA ground 1; see **Section C** below). Elecnor waived its right to require arbitration of that "matter" by instituting that claim in the Court (NOA ground 4; see **Section D** below).
 - (b) Further or alternatively, Elecnor's claims were not incapable of being arbitrated merely because they involved questions as to the effect of a deed of company arrangement and provisions of the *Corporations Act 2001* (Cth) (NOA ground 2; see **Section E** below). Nor was there any issue that the Trustees were claiming "through or under" Clough in relation to Elecnor's claims (NOA ground 3; cf NOC ground 1; see **Section F** below). By bringing the claims in court, Elecnor breached the arbitration agreement as construed by the primary judge (cf NOC ground 2; see **Section G** below). That agreement was discharged by repudiation or abandonment (NOA ground 4; cf NOC grounds 3; see **Section H** below).

- (c) The primary judge was correct not to stay the applicants’ defence denying the validity of the offer that purported to engage the compulsory acquisition process (cf NOXA ground 1; see **Section I** below). If the dispute as to contribution or that defence was required to be arbitrated, his Honour ought to have stayed the balance of the proceeding pending the determination of the arbitration (NOA ground 5; see **Section J** below).

B Background

3. By a deed dated 8 October 2020 (the **JV Deed**), Elecnor and Clough created a joint venture to undertake a large-scale energy infrastructure project for NSW Electricity Operation Pty Ltd (**Transgrid**): J[1]-[2], [14] [White Folder (**WF**) 19, 22]. As contemplated by the deed, Elecnor and Clough entered into an “Engineer, Procure and Construct Contract” with Transgrid on 2 June 202 (the **EPC Contract**): J[3] [WF19]. The EPC Contract required the joint venture to obtain and maintain performance securities for the benefit of Transgrid, and each of Clough and Elecnor procured the issue of bank guarantees and insurance bonds for that purpose: J[30] [WF27]. In the event of a disproportionate call on the securities from one of the joint venturers, the other was to pay contribution within two business days of a written demand under cl 13.2 of the JV Deed [WF330]: J[17] [WF22-23].
4. Clough entered voluntary administration on 5 December 2022: J[5], [33] [WF20, 28]. Elecnor executed a deed allowing Clough to continue to operate and provide employees to the project but, two days later, exercised step-in rights to carry on the business of the joint venture and complete the balance of the works: J[6], [34]-[35] [WF20, 28]. On 14 February 2023, Transgrid drew down on all of the bank guarantees and insurance bonds procured by Clough in the amount of \$109,561,702 but did not draw down on any of the bank guarantees or insurance bonds procured by Elecnor: J[9], [39] [WF21, 29]. The next day,¹ Clough executed a deed of company arrangement (the **DOCA**), which required the transfer of certain of its assets to a creditors’ trust, including rights in respect of the bonds called upon, and converted creditors’ claims against Clough into claims against that trust: J[5], [37] [WF20, 29].

¹ See DOCA dated 15 February 2023 [WF360]; cf J[5] referring to 16 February 2023 [WF20] (although nothing turns on the difference in the proposed appeal).

5. Elecnor has not made any claim against the creditors' trust. Instead, on 1 July 2024, it purported to engage the compulsory acquisition process in cl 21.3(a)(iv) of the JV Deed [WF337-339], by offering to buy Clough's interest for \$1 based on a failure to remedy a non-provision of security one year and seven months earlier [WF557-558]: J[7], [21], [40] [WF20, 29-30]. In support of the acquisition of Clough's rights, Elecnor contended that the transfer or assignment of those rights to the Trustees by the DOCA was "of no effect" because Elecnor had not given its consent, which was said to be required under the JV Deed. On 8 July 2024, Clough and the Trustees replied that they did not accept Elecnor's entitlement to make the offer or the validity of the offer [WF559-560]: J[7], [41] [WF20]. The reply noted that the Trustees had not "adopted" the JV Deed "in [their] capacity as either administrators or as trustees of the Creditors' Trust" and did not do so by the letter.
6. Five months later, on 13 December 2024, Elecnor's solicitors sent an email to confirm that the solicitors for Clough and the Trustees had "instructions to accept service of Court proceedings in relation to the Secure Energy Joint Venture" [WF562]. The email did not refer to the arbitration agreement in cl 23.3 of the JV Deed [WF341], let alone reserve any rights thereunder. Upon receiving the confirmation on 16 December 2024, Elecnor's solicitors served the summons and commercial list statement (CLS) that commenced the proceeding below in this Court [WF561].
7. By the proceeding, Elecnor seeks a declaration that the DOCA did not transfer Elecnor's interest in the joint venture, JV Deed or EPC Contract to the Trustees (prayer 1), relying upon the prohibitions on assignment without consent in the agreements (CLS [8], [11]) [WF257, 265]. In turn, it seeks an order for specific performance in respect of the compulsory acquisition provisions of the JV Deed as against Clough or alternatively the Trustees (prayers 2-3), relying on its "Offer to Purchase" (CLS [29]) [WF257, 268]. In support of this claim, it alleges that it "is and was at all material times ready and willing to perform the terms of the JV Deed insofar as they remain to be performed, and to do all matters and things on its part to be done, including those that arise from the Offer to Purchase" (CLS [32]) [WF269].
8. By a commercial list response filed on 7 March 2025 (CLR), the applicants disputed Elecnor's contention as to the need for consent and entitlement to specific performance on various grounds [see WF273-274]. Relevantly for present purposes, the applicants:

- (a) denied that the assignment provisions in the JV Deed applied to Clough's rights to payment including of contribution after a disproportionate call on its security (CLR [7(b)(iii)], [8(c)-(d)], [11(b), (d)]) and, in turn, denied that those rights could be purchased from Clough after they had been transferred to the Trustees by the DOCA (CLR [28(c)]) [WF276-279, 284];
 - (b) denied that Clough's offer to purchase was valid, including by reason of the ipso facto stay in s 451E of the *Corporations Act* (CLR [18(d)], [28(e)]) and, further or alternatively, on the basis that the purported specification of an offer price of \$1 was contrary to express obligations of a quasi-fiduciary kind and of good faith and reasonableness (CLR [7(b)(iv)-(vi)], [29(d)]) [WF276-277, 282, 284-287]; and
 - (c) pleaded that they did not know and therefore could not admit the allegation of readiness and willingness to perform (CLR [31]) [WF287], in circumstances where the applicants had on the same day demanded payment of \$54,780,851, being half of the value of the securities drawn down by Transgrid [WF564-566] (J[43]-[44] [WF31]).
9. When that sum was not paid within two business days, the applicants filed a cross-summons for judgment in favour of the Trustees or alternatively Clough on 12 March 2025 [WF292-293]. A corrected version of the commercial list cross-claim statement (CLXS) was filed two days later, which in [15] repeated allegations in the CLR to the effect that the right to be paid contribution had been transferred to the Trustees (WF296).
 10. On 26 March 2025, Elecnor's solicitors wrote asserting that the applicants were "in breach of cll 23.2 and 23.3 of the JV Deed in bringing their Cross-Claim" [WF568A-568B]. The next day, Elecnor filed a motion to stay the cross-claim, including under s 7(2) of the *International Arbitration Act 1975* (Cth) (IAA). On 16 April 2025, the applicants filed a contingent cross-motion relevantly seeking a stay of Elecnor's claim pending the determination of any arbitration [WF58-59]. On 6 May 2025, Elecnor amended its motion to cover not only the cross-claim but also the so-called "claim" in CLR [29(d)] read with [7] as to the purported specification of the offer price [WF60-61].

11. At the hearing of the motions, the applicants noted that they dispute Elecnor’s readiness and willingness based on its attitude to paying contribution.² This attitude was reflected in Elecnor’s own submission at the hearing that it had “various potential defences” to the claim for contribution, including that the call was based on Clough’s “material default” as well as “other issues, including, for instance, set-off claims”.³
12. On 12 June 2026, the primary judge delivered reasons concluding that s 7(2) of the IAA required him to “stay the Cross-Claim but not any aspect of the main proceedings” and stating that his Honour saw “no reason” why the main proceedings should be stayed on case management grounds: J[132]-[135] [WF52-53]. On 19 June 2025, his Honour made orders staying “the matter raised in the cross-claim” except CLXS [15] and dismissing the applicants’ cross-motion [WF252]. On 25 July 2025, Elecnor filed its reply joining issue with the applicants in respect of the allegations other than admissions in the CLR, as well as its response to the cross-claim [WF301A-301I].

C The one “matter” (NOA ground 1)

13. Underlying the primary judge’s conclusion as to s 7(2) of the IAA was a finding that there are two “matters” for the purposes of that provision: J[102] [WF45]. For the reasons that follow, one of these—the “dispute or controversy about the engagement and enforcement of the compulsory acquisition process” in the JV Deed—*encompassed* the “dispute or controversy in relation to Clough’s entitlement to contribution”, which was said to constitute another, separate “matter”.
14. By its claim for specific performance, Elecnor seeks “enforcement of the compulsory acquisition process” on the pleaded basis that it is and was ready and willing to perform “the terms of the JV *insofar as they remain to be performed*, and to do *all* matters and things on its part to be done”. That plea was decidedly not limited to matters and things “that arise from the Offer to Purchase”. In its terms, it includes an allegation that Elecnor was and is ready and willing to pay any contribution for which it is liable upon demand.

² Transcript of proceedings on 28 May 2025 at 12.26-35 [WF146].

³ Ibid at 45.10-23 [WF179].

15. Elecnor’s claim could not, standing alone, constitute a “matter”: “there must be two sides to a controversy”.⁴ The other side of the “matter” here consists of the various grounds on which the applicants resist “the engagement and enforcement of the compulsory acquisition process”. These include the traverse of Elecnor’s plea of being ready and willing based on the non-satisfaction of “Clough’s entitlement to contribution”. The effect of the primary judge’s finding is to carve out the dispute as to that entitlement from the broader “matter” raised by Elecnor’s claim for specific performance.
16. His Honour sought to justify that finding on the basis that the contribution claim “is not a response to Elecnor’s Offer to Purchase”, “involves the exercise of different rights, both contractual and equitable”, and “may involve different factual and legal issues”: J[106] [WF46]. But none of these points takes the contribution dispute beyond the scope of the dispute regarding the compulsory acquisition process. The latter dispute is not limited to whether that process was engaged by the “Offer to Purchase” but extends to whether it should be enforced. A single “matter” may involve multiple rights with different juridical sources,⁵ and here the applicants’ right to contribution is part of what is sought to be acquired in the purported exercise of a right by Elecnor. And one “matter” may involve any number of different factual and legal issues, as addressed below.
17. The primary judge also acknowledged that “[t]he existence of unperformed or ongoing contractual obligations may be relevant to the nature and availability of the relief sought by Elecnor” but said that this did “not dictate how to identify the ‘matter’ for the purposes [of] s 7(2) of the Act”: J[107] [WF46-47]. But it is settled law that “[t]he scope of the matter is to be ascertained from *the pleadings* and from the underlying subject matter upon which the pleadings, *including the defence*, are based”.⁶ Elecnor pleaded that it would do all things required to be done on its side, and the applicants were

⁴ *DFD Rhodes Pty Ltd v Hancock Prospecting Pty Ltd* [2022] WASCA 97 at [171] per Quinlan CJ and Beech JA; *North West Pilots Pty Ltd as trustee for the Port Hedland Pilots Unit Trust trading as Port Hedland Pilots v Daniel* [2023] WASCA 122 at [46] per Buss P, Beach and Vaughan JJA.

⁵ See, eg, *Recyclers of Australia Pty Ltd v Hettinga Equipment Inc* (2000) 100 FCR 420 identifying the “matter” in terms of an entitlement to recover damages by reason of representations under the *Trade Practices Act 1974* (Cth) and in negligence.

⁶ *Ibid* at [18] per Merkel J (emphasis added and omitted), approved in, eg, *Flint Ink NZ Ltd v Huhtamaki Australia Pty Ltd* (2014) 44 VR 64 at [33]-[34] per Warren CJ, [89], [106] per Nettle JA, *In the matter of Infinite Plus Pty Ltd* (2017) 95 NSWLR 282 at [60] per Gleeson JA and *Hancock Prospecting Pty Ltd v DFD Rhodes Pty Ltd* (2020) 55 WAR 435 at [128]-[134] per Quinlan CJ.

entitled to traverse that plea by reference to an the underlying right to contribution sought to be acquired by Elecnor.

18. In its response to the application for leave and summary of argument (**RSA**), Elecnor submits (at [9]) that it “did not itself raise, let alone agree to then litigate, any and all possible allegations of breaches of the JV Deed” [Cross-Appeal White Folder (**XWF**) 9]. But it chose to litigate whether it is ready and willing to perform its side of that deed and, more to the point, it chose to litigate a “matter” that would not be defined solely by allegations raised in its pleading. In support of this submission, Elecnor refers to a statement of Mason J that “a plaintiff in a suit for specific performance is not required to show that he has *strictly* complied with all his obligations under the contract”.⁷ But the point being made by his Honour was that “it is enough that he has performed and is ready and willing to perform the *substance* of the contract”.⁸ On any view, the applicants’ entitlement to some \$55 million in contribution is a matter of substance under the JV Deed. Even if this was only arguably the case, it would render the issue of contribution part of the one “matter” because it may provide a defence to Elecnor’s claim.
19. More generally, Elecnor’s submissions proceed on the footing that the applicants’ “real complaint” is “that claims or disputes raised in one ‘matter’ may affect findings or the availability of relief in the other ‘matter’”: RSA[6] [XWF8]. Elecnor answers that complaint by pointing out, at some length, that one “matter” may affect or be affected by issues raised or findings made in non-arbitrable “matters”: RSA[6], [10], [13] [XWF8-10]. But this knocks down a strawman. In reality, the applicants’ complaint is that the primary judge referred off part of their side of the “matter” to arbitration while allowing Elecnor to litigate its side of the “matter” in full before any arbitration is determined.
20. That approach falls squarely within the Full Court’s warning against an “overly fine dissection” of disputes within “a wide-ranging and interlocking controversy”.⁹ In Elecnor’s words, it seeks “to excise disputes from an otherwise broad arbitration

⁷ *Green v Sommerville* (1979) 141 CLR 594 at 610 (emphasis added).

⁸ *Ibid* (emphasis added)

⁹ *Hancock Prospecting Pty Ltd v Rinehart* (2017) 257 FCR 442 at [157] per Allsop CJ, Besanko and O’Callaghan JJ.

agreement contrary to the very purpose of the agreement”: RSA[13], cf [8] [XWF8, 10].

D Waiver by Elecnor (NOA ground 4)

21. In turn, NOA ground 4 challenges the finding that the arbitration agreement was not “inoperative” for various reasons, including waiver: J[131] [WF52]. The primary judge did “not accept that by commencing proceedings of this kind, and of this content, Elecnor waived its right to arbitrate what is in substance a *different matter* raised in the Cross-Claim”: J[129] [WF51-52] (emphasis added). But this reasoning falls away if NOA ground 1 is upheld.
22. The primary judge underscored the reasoning on the basis that, when the proceedings were commenced, Clough had not made “a demand for contribution under cl 13.2 of the JV Deed, which is an essential requirement for the crystallisation of any obligation on the part of Elecnor to contribute”: J[129] [WB52]. But Elecnor’s plea of readiness and willingness was not confined to obligations that had crystallised at the time of commencement. It included an allegation that Elecnor was “ready and willing to do at the proper time in the future whatever in the events that have happened the contract requires that [it] do”.¹⁰ In the event that a demand was made, which happened following Elecnor’s claim, the JV Deed required Elecnor to pay contribution subject to any defence.
23. Elecnor seeks to uphold the primary judge’s conclusion by contending that it could not have waived its right to arbitrate where it was “unaware” of the claim for contribution “when commencing proceedings”: RSA [29] [XWF15]. But a party is taken to have waived its right to arbitrate where it was “aware of the *availability* of arbitration” and, “being so aware”, has “intentionally engaged in conduct which irrevocably abandoned the *pursuit* of arbitration”.¹¹ Further, by its plea of readiness and willingness, it is apparent that Elecnor was aware that an issue in the curial proceedings it instituted would be the extent to which it was ready and willing to perform “the terms of the JV *insofar as they remain to be performed*, and to do *all* matters and things on its part to

¹⁰ *Mehmet v Benson* (1965) 113 CLR 295 at 314 per Windeyer J.

¹¹ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [87] per Austin J.

be done”. Thus, Elecnor clearly had sufficient knowledge of the circumstances of the dispute to effect a waiver.

24. Conscious of this, Elecnor submitted below that it was “more efficient and justifiable” for it to seek specific performance in court along with other “matters” said to be “non-arbitrable”.¹² That submission only points up that Elecnor was aware of the availability of arbitration when it made that claim, no doubt intentionally. In doing so, it irrevocably abandoned the pursuit of arbitration of the “matter” arising from the claim, including any issue raised by a traverse of the plea emphasised above.
25. The conclusion that Elecnor waived its right to require arbitration of the contribution claim does not depend on the issues as to arbitrability and parties addressed below. Elecnor could have chosen only to litigate its claim for a declaration as to the effect of the DOCA which is said to raise those issues. It made a forensic decision, apparently for reasons of efficiency, to litigate a further claim for specific performance on the basis pleaded and thereby abandoned the pursuit of arbitration with respect to any dispute about the plea. In any event, for the reasons that follow, Elecnor could have brought both of its claims in arbitration.

E Arbitrability (NOA ground 2)

26. There is no issue that the “matter” or “matters” in the proceeding below fall within the scope of the arbitration agreement in cl 23.3 of the JV Deed: J[108] [WF47]. The primary judge also acknowledged that, generally, any dispute or claim which can be the subject of an enforceable award is arbitrable: J[109] [WF47]. Indeed, there is authority in this Court that “it is only in extremely limited circumstances that a dispute which the parties have agreed to refer to arbitration will [be] held to be non-arbitrable”.¹³
27. The primary judge found, however, that the dispute as to the compulsory acquisition is non-arbitrable because it “invokes and involves questions as to the efficacy of the DOCA and the provisions of Pt 5.3A of the *Corporations Act*”, which “may affect the rights of creditors”: J[110] [WF47]. By contrast, his Honour found that the dispute as to contribution *was* arbitrable because, while “creditors may be interested in the

¹² Plaintiff’s Submissions on Stay Motions at [97] [WF114].

¹³ *Rinehart v Welker* (2012) 95 NSWLR 221 at [167] per Bathurst CJ (McColl and Young JJA relevantly agreeing).

outcome”, “it would not have the potential to affect [their] substantive rights ... to the same extent”: J[111] [WF48]. These findings are challenged by NOA ground 2.

28. As to the acquisition dispute, the primary judge stated that there “may” be a “legitimate public interest” in such a dispute being “resolved by public institutions or in accordance with structures that are established by parliament” rather than “by the parties”: J[110] [WF47-48] (emphasis added). His Honour cited various authorities, to which Elecnor has added others: J[110], fn 78 [WF48]; RSA[18], fn 6 [XWF12]. Most of these contain lists of examples of proceedings that may not be arbitrable which include “insolvency” proceedings.¹⁴ But two of the authorities make clear that the insolvency proceedings referred to are those invoking “special powers to be exercised having regard to specialist public interest criteria”,¹⁵ such as powers to wind up a company¹⁶ and powers to avoid unfair preferences, transactions at undervalue or with intent to defraud creditors.¹⁷
29. Here, Elecnor seeks a declaration that rights have not been transferred by reason of prohibitions on assignment and specific performance of a contractual process. The applicants resist those claims on grounds including that the rights were capable of being transferred notwithstanding the prohibitions by force of the *Corporations Act* (CLR [8(c)]) and that a notice and offer purporting to engage the contractual process were invalid based on s 451E of the Act (CLR [18(d)], [28(e)]) [WF277-278, 282, 284-285]. Those grounds do not involve the exercise of any special powers but simply turn on questions arising under the *Corporations Act*, which is not sufficient to engage public policy considerations against referral any more than with other legislation such as the *Trade Practices Act 1974* (Cth) and its successors.¹⁸

¹⁴ *Siemens Limited v Origin Energy Uranquinty Power Pty Ltd* (2011) 80 NSWLR 398 at [38] per Ball J; *Comandate Marine Corporation v Pan Australia Shipping Pty Ltd Ltd* (2006) 157 FCR 45 at [200] per Allsop J (Finn and Finkelstein JJ agreeing); *WDR Delaware Corporation v Hydrox Holdings Pty Ltd* (2016) 245 FCR 452 at [124]-[128] per Foster J; *Larkden Pty Ltd v Lloyd Energy Systems Pty Ltd* (2011) 279 ALR 772 at [63]-[65] per Hammerschlag J.

¹⁵ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [193] per Austin J.

¹⁶ *Ibid* at [194], [191], citing *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd* [1999] VSC 170 at [18] per Warren J.

¹⁷ *Larsen Oil and Gas Pte Ltd v Petropod Ltd* [2011] SGCA 21 at [45]-[46], [52]-[58] per Rajah JA for the Court.

¹⁸ *ACD Tridon v Tridon Australia* [2002] NSWSC 896 at [192] per Austin J.

30. If the dispute as to enforcement of the compulsory acquisition process is not arbitrable, however, then nor is the dispute as to contribution. Neither affects the substantive rights of creditors directly in the way that a winding up order or order avoiding a preference does. But both affect the interests of creditors inasmuch as they affect the assets available for distribution among creditors. The only ground for distinguishing the two is that one involves questions under the *Corporations Act* and the latter *might* not, depending on the defences run by Elecnor. That is not decisive of the public interest.

F Trustees claiming “through or under” (NOA ground 3; cf NOC ground 1)

31. The primary judge found there was a “question” or “issue” as to whether the Trustees were claiming “through or under” Clough in relation to the acquisition dispute, which it was “not necessary” for his Honour to resolve: J[121], [123], [128] [W50-51]. NOA ground 3 challenges that finding, which was relied on in by his Honour in denying that the arbitration agreement had been repudiated. By NOC ground 1, Elecnor contends that the Trustees are *not* parties claiming “through or under” Clough in respect of that “matter”.
32. Both the primary judge and Elecnor rely on the Trustees’ denial of having “adopted” the JV Deed: J[123] [WF50]; RSA[19] [XWF12]. But that was merely a confirmation that the Trustees were not agreeing to accept personal liability under the JV Deed in accordance with the common law rule traditionally applied to receivers,¹⁹ and now reflected in the *Corporations Act*.²⁰ The extended definition of “party” in s 7(4) of the IAA does not depend on any such acceptance. Indeed, its purpose is to ensure that a person who is *not* liable under a contract with an arbitration agreement but claims through or under a person who is so liable becomes “bound by force of the statute”.²¹
33. Elecnor further submits that the Trustees are not claiming “through or under” because they do not “rely upon a right or interest *vested* in or *exercisable* by Clough” as an “essential element of their defence” to its claim about the DOCA or “take a stand upon a ground that *is* available to Clough under the JV Deed”: RSA[19] [XWF12] (emphasis added). But the “right”, “interest” or “ground” relied on by a person claiming “through

¹⁹ *O’Callaghan v Customer Credit Corporation* (unreported, Supreme Court of Western Australia, 17 December 1997) at 16-17 per Anderson J, appeal dismissed: [1999] WASCA 70; *Australian Securities and Investments Commission v Letten [No 13]* [2011] FCA 1151 at [70] per Gordon J.

²⁰ *Corporations Act*, ss 419, 419B (as to receivers), 443A, 443B (as to administrators).

²¹ *Tanning Research Laboratories v O’Brien* (1990) 169 CLR 332 at 341 per Brennan and Dawson JJ.

or under” does not need to be still “vested in”, “exercisable by” or “available to” the original party.²² To the contrary, a person who was or claims to have been transferred a right or interest from a party is the *archetype* of a person claiming “through or under”.²³ Here, the Trustees only “rely upon the terms and effect of the DOCA and provisions of the Corporations Act” in order to support their claim to have been transferred “Clough’s Interest and/or Clough’s Payment Rights: CLR [26(b)] [WF284]. There was never any real issue about the Trustees’ status as “parties”.

34. Elecnor’s submission on this point is also self-defeating. If a person was only claiming “through or under” a party where the former took a stand upon a ground *presently* available to the latter, then the Trustees would not be claiming “through or under” Clough in asserting a right to contribution on the basis that this was transferred to them from Clough by the DOCA: CLXS [15] [WF297].

G *Elecnor’s breach of the arbitration agreement (NOC ground 2)*

35. As the primary judge indicated, the JV Deed contains a multi-tiered dispute resolution framework: J[73], [78] [WF38-39]. This includes provision for referral of “a dispute or difference in connection with this Deed or the Project” to the CEO of each party for executive negotiation under cl 23.2 [WF341]. “If the parties have not resolved the dispute or agreed an alternative dispute resolution process within 45 days of the dispute being referred”, then cl 23.3 provides that “any party may, by written notice to the other parties, submit the dispute to arbitration”.
36. The primary judge distinguished three constructions of that clause: (i) the “Permissive Construction” under which either party could arbitrate or litigate under cl 26.2, (ii) the “Mandatory Construction” under which arbitration was the mandatory procedure for binding dispute resolution, and (iii) the “Elective Construction” under which either party could litigate unless the other insisted on arbitration (J[60]-[64] [WB35-36]). His Honour adopted the mandatory reading: J[65], [75]-[77] [WF36, 38-39].

²² See *ibid* at 342 stating that “an essential element of the cause of action or defence must be *or have been* vested in or exercisable by the party” (emphasis added).

²³ See, eg, *Rumpu (Panama) SA v Islamic Republic of Iran Shipping Lines (The “Leage”)* [1984] 2 Lloyd’s Rep 259 at 262 per Bingham J; *Schiffahrtsgesellschaft Detlev von Appen GmbH v Voest Alpine Intertrading GmbH* [1997] 2 Lloyd’s Rep 279 at 285 per Hobhouse V-C and Morrit J; *Tanning Research Laboratories v O’Brien* (1990) 169 CLR 332 at 341 per Brennan and Dawson JJ; .

37. If NOA grounds 2 and 3 are upheld and NOC ground 1 is rejected, then each “matter” raised by Elecnor’s claims was an arbitrable matter within the scope of the arbitration agreement between “parties” to that agreement. On the primary judge’s construction, it follows that Elecnor breached the arbitration agreement by bringing its claims in court. In an attempt to escape the finding of breach, Elecnor reagitates the Elective Construction under NOC ground 2. That ground should be rejected for several reasons arising from what was said by the primary judge, which is not addressed by Elecnor in its response to the application for leave.
38. *First*, contrary to Elecnor’s submission, it is not supported by the use of the word “may” in the clause: cf RSA[24] [XWF13-14]. That language is equally explicable on the basis that each party may choose to take their dispute no further, as the primary judge held (J[74] [WF38]), consistently with statements as to similar language in cases in this Court and the High Court.²⁴
39. *Secondly*, if the word “may” indicated a choice whether to arbitrate or litigate, it would be a choice of “any party” in line with the Permissive Construction. To avoid this result, Elecnor is driven to depart from the contractual language in one of two ways. In NOC ground 2, it contends that “a party is not in breach of that clause in commencing or pursuing court proceedings in respect of a dispute falling within the scope of that clause, *unless the other party requires that dispute to be arbitrated*” (emphasis added). This, in effect, rewrites the clause to say that “any party may ... *require* the dispute to be submitted to arbitration”. In RSA[24][XWF13-14], Elecnor submits that the use of “may” “indicates that *the parties* may, if they so choose, litigate disputes instead” (emphasis added). This replaces the singular “any party” in the clause with the plural “the parties”.
40. *Thirdly*, the arbitration agreement is only engaged if the parties have not resolved the dispute or agreed an “alternative dispute resolution process” within a time period. The primary judge reasoned that this did “not bespeak litigation”, although parties could “agree to litigate a particular dispute” through “a waiver or variation”: J[81] [WF40]. But if the reference to agreeing an “alternative dispute resolution process” encompasses

²⁴ *ABB Power Plants Ltd v Electricity Commission of New South Wales* (1995) 35 NSWLR 596 at 599 per Handley JA; *PMT Partners Pty Ltd (In liq) v Australian National Parks and Wildlife Service* (1995) 184 CLR 301 at 312 per Brennan CJ, Gaudron and McHugh JJ.

litigation, that only reinforces the absence of any warrant for reading “may” as some further election.

41. *Fourthly*, the Elective Construction is apt to invite commercially inconvenient results. One such result was identified by the primary judge: on this construction, “each party has agreed that, if it goes to the expense of commencing proceedings in court, but the other party makes a subsequent election to arbitrate that claim, it must abandon the litigation in favour of arbitration”: J[80] [WF39-40].²⁵ Another inconvenient result is illustrated by what Elecnor is seeking to do here: on this construction, a plaintiff may commence a proceeding in court and, when faced with a defence and possibly cross-claim, elect which parts it wishes to have referred off for arbitration, subject to doctrines of waiver and the like. As Elecnor submitted below, “it should not lightly be inferred that rational businesspeople intended for different disputes arising out of the same relationship to be resolved in different fora”.²⁶
42. *Fifthly*, the Elective Construction is contrary to the weight of authority in this country. The first citation given by Elecnor in support of its construction is to the case in this Court referred to above in the reasons of the one member of the Court (Cole JA) who did not decide the construction issue but instead noted that the trial judge (Giles J) and other two members of this Court (Handley JA and Sheller JA) adopted the mandatory reading.²⁷ The other two authorities cited decisions of the High Court of Singapore and the Privy Council,²⁸ which did not refer to the Australian cases noted above, considered clauses without the reference to “alternative dispute resolution”, and did not squarely address the other difficulties identified above.

H Repudiation or abandonment (NOA ground 4; cf NOC ground 3)

43. As set out above, Elecnor commenced its proceeding in this Court in breach of the arbitration agreement. By NOC ground 3, it contends that this breach did not amount to repudiation, which is also the subject of NOA ground 4. Citing various authorities, it submits that “[a] party choosing to litigate *some disputes in certain circumstances*,

²⁵ See also *InfraShore Pty Ltd v Health Administration Corporation* [2015] NSWSC 736 at [35] per Hammerschlag J.

²⁶ Plaintiff’s Submissions on Stay Motions at [43] [WF97].

²⁷ See *ABB Power Plants Ltd v Electricity Commission of New South Wales* (1995) 35 NSWLR 596 at 599 per Handley JA at 617.

²⁸ *WSG Nimbus Pte Ltd v Board of Control for Cricket in Sri Lanka* [2002] 3 SLR 603; *Anzen Ltd v Hennes One Ltd* [2016] UKPC 1 at [33].

even if in breach of an arbitration agreement, does not without more convey that they intend to not comply with the arbitration agreement with respect to the wide range of *disputes that may arise in the future*”: RSA[26] [XWF14].

44. The reliance on authority is misplaced. As Allsop J noted in one of the decisions cited,²⁹ whether a party has repudiated an arbitration agreement is “not to be answered by examining the different facts of another entirely unrelated case or even one with some similarities”. This accords with the remark of Gleeson CJ and Kirby J that “it is a sterile exercise, involving a misuse of precedent, to seek the solution to one case in decisions on the facts in other cases”, the “proper use of precedent” being “to identify the legal principles to apply to facts as found”.³⁰
45. The legal principle here is simply that a repudiation in the form of “renunciation” consists of “conduct of a party which evinces an intention no longer to be bound by the contract or to fulfil it only in a manner substantially inconsistent with the party’s obligations”.³¹ That principle is to be applied to an arbitration agreement, which is regarded as a “self-contained contract” which is “collateral or ancillary” to the main agreement in which it appears.³²
46. Elecnor did not choose to litigate any old “disputes” in court. It chose to litigate the disputes that will decide whether it may compulsorily acquire Clough’s “Participating Interest” under cl 21.3 of the JV Deed and thereby practically bring to an end the “unincorporated and fully integrated joint venture” established by cl 2(a) of that deed [WF315, 337-338]. If achieved, such result would not foreclose the possibility that other disputes “may arise in the future” which could be arbitrated. But on any view, it is “substantially inconsistent” with the obligation imposed by the arbitration agreement as a self-contained contract.

²⁹ *Comandante Marine Corp v Pan Australia Shipping Pty Ltd* (2006) 157 FCR 45 at [86].

³⁰ *Vairy v Wyong Shire Council* (2005) 223 CLR 422 at [2].

³¹ *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Ltd* (2007) 233 CLR 115 at [44] per Gleeson CJ, Gummow, Heydon and Crennan JJ.

³² *Bremer Vulkan Schiffbau und Maschinenfabrik v South India Shipping Co Ltd* [1981] AC 909 at 980 per Lord Diplock.

47. What is more, Elecnor did not choose to litigate the disputes in “circumstances” that objectively explained or qualified its decision.³³ Its pre-writ correspondence just sought confirmation of “instructions to accept service of *Court proceedings in relation to the Secure Energy Joint Venture*”. There was no account of why the proceedings were being commenced in Court, by reference to the status of the Trustees or the arbitrability of any question or otherwise. Nor was there any attempt by Elecnor in that correspondence to circumscribe the scope of the proceedings it sought to be able to serve on the applicants. Those *ex post facto* justifications only emerged in written submissions (for the “party” issue)³⁴ and during the hearing of the motions (for the issue as to insolvency proceedings).³⁵ And in any event, for the reasons outlined above, they are without substance and did not negate any “repudiatory intent” as the primary judge suggested: J[128] [WF51].
48. In choosing to litigate disputes going to its ability to acquire Clough’s Participating Interest, Elecnor repudiated the arbitration agreement, and that repudiation was accepted by the applicants filing their commercial list response. It follows that the agreement was rendered inoperative by repudiation.
49. Alternatively, it was “plain” from the parties’ conduct that neither intended the arbitration agreement to be “further performed” at least in relation to disputes relating to Clough’s rights and interest in the joint venture, such that they are to be “regarded as having so conduct themselves as to abandon or abrogate the contract, which is “discharged by inferred agreement”.³⁶ The primary judge did not accept that the agreement had been abandoned for the reasons given in relation to repudiation and waiver. His Honour erred, with respect, in doing so, for the reasons set out above.

I Issues as to Elecnor’s offer price of \$1 (NOXA ground 1)

50. The JV Deed contains express obligations not to make an undisclosed profit or misuse one’s position, to act in good faith for all matters relating to the joint venture and to be

³³ cf *Marty Ltd v Hualon Corp (Malaysia) Sdn Bhd (Rec and mgr apptd)* [2018] SGCA 63 at [54] per Prakash JA for the Court.

³⁴ Plaintiff’s Submissions on Stay Motions at [76] [WF107-108].

³⁵ Transcript of proceedings on 28 May 2025 at 52.25-53.8 [WF186].

³⁶ *Woolworths Group Ltd v Gazcorp Pty Ltd* [2022] NSWCA 19 at [91], [93] per Bell P (Meagher JA agreeing), following *Ryder v Frohlich* [2004] NSWCA 472 at [135] per McColl JA (Hodgson and Ipp JJA agreeing) and *Tecnicas Reunidas SA v Andrew* [2018] NSWCA 192 at [51] per Leeming JA (Bathurst CJ and White JA agreeing).

reasonable, honest and diligent in performing obligations: cll 5(c), (h) [WF317]. By CLR [7], the applicants contend that those obligations apply to the specification of the “Offer Price” in a written offer under cl 21.3(a)(iv)(A) of the JV Deed in circumstances where the other party may not reject the offer itself but only the price, leading to an expert determining the price according to a formula in Sch 3 of the deed [WF337-338, 354].

51. In turn, by CLR [29(d)], the applicants contend that Elecnor acted contrary to those obligations “in purporting to specify an Offer Price of ‘\$1.00 (one dollar)’ in the purported Offer to Purchase”, that being a price which the applicants would be “mad not to dispute”, to adopt the words of senior counsel for Elecnor at the hearing.³⁷ The primary judge did not stay this contention based on a finding that it was “responsive to and intrinsically connected with Elecnor’s Offer to Purchase” and “thus part of the substantive controversy relating to cl 21.3” of the JV Deed.³⁸ Elecnor seeks leave to cross-appeal against the decision not to stay the contention by challenging that finding.
52. The proposed cross-appeal has no merit. The contention as to the offer price was not advanced in support of a claim for damages. It was and is relied on solely as a ground for impugning the offer which Elecnor relies on as having engaged the compulsory acquisition process that it seeks to enforce. It is not different in this regard from various other grounds referred to above, such as that relying on s 451E of the *Corporations Act*. In this and other respects, Elecnor’s case rests on an unstated major premise that a plaintiff who is a party to an arbitration agreement can pick and choose which defences to its claim it wishes to have referred off to confidential arbitration and which it is content to meet in court.

J Contingent stay of Elecnor’s claims (NOA ground 5)

53. On the hypothesis that s 7(2) of the IAA required the Court to stay the applicants’ cross-claim, the primary judge saw “no reason” why the main proceedings brought by Elecnor should be stayed: J[132]-[135] [WF52]. His Honour reasoned that “[r]esolution of the controversy between the parties as to the acquisition of Clough’s interest will not depend on the outcome of the arbitration of the Trustees’ claim for contribution for the

³⁷ Transcript of proceedings on 28 May 2025 at 35.33-34 [WF186].

³⁸ J[105] [WF46].

call on Clough’s security”: J[135] [WF52]. In so reasoning, his Honour’s discretion miscarried on two levels within NOA ground 5.

54. *First*, contrary to his Honour’s reasoning, the issues arising on Elecnor’s claim for a declaration depended on the outcome of the arbitration. If the dispute as to contribution is to be stayed, then the question as to whether either of Clough or the Trustees is entitled to such contribution will only be determined in arbitration. The applicants rely on the fact that Clough had a right to be paid such contribution on demand in resisting the declaration claim based on the effect of the *Corporations Act* or the public policy against restraints on alienation: CLR [8(c)-(e)]. In the absence of any finding or agreement as to that fact, the declaration sought is “purely hypothetical”.³⁹ This was raised in submissions but not considered in the reasons.⁴⁰ It is to be inferred that his Honour either acted upon a wrong principle as to whether the declaration was available or failed to take into account the material consideration as to the dependency or both.
55. *Secondly*, the primary judge’s reasoning was internally inconsistent. As noted above, whether Elecnor is and was ready and willing to perform depends on the dispute as to the applicants’ entitlement to contribution. The primary judge recognised as much in observing that “[t]he existence of unperformed or ongoing contractual obligations may be relevant to the nature and availability of the relief sought by Elecnor”: J[107] [WF46]. But in reasoning that there was no reason to stay Elecnor’s claim for relief, his Honour posited that “[r]esolution of the controversy between the parties as to the acquisition of Clough’s interest” would “*not* depend on the outcome of the arbitration of the Trustees’ claim for contribution”: J[135] [WF52]. In exercising the discretion, his Honour must have failed to have regard to the material consideration earlier identified.
56. If this Court upholds the primary judge’s decision that Elecnor is entitled to a stay of the cross-claim, it ought re-exercise the discretion in favour of staying the balance of the proceeding pending the determination of that arbitration. That would enable the arbitrator to determine the cross-claim first, before Elecnor could then pursue its claims (if they survive the arbitral determination). That is both the most efficient course

³⁹ *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334 at [49] per Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ.

⁴⁰ Defendants’ submissions in reply on stay motions at [41] [WF132-133]; transcript of proceedings on 29 May 2025 at 34.25-47 [WF247].

procedurally, and the necessary course having regard to the need ultimately to determine whether (or not) to grant the relief sought by Elecnor in the proceedings.

14 October 2025



Julie Taylor

Shoreline Chambers

08 6288 2408

jtaylor@shorelinechambers.com.au



Tom O'Brien

Eleven Wentworth

02 8228 7114

obrien@elevenwentworth.com



Daniel Farinha

Eleven Wentworth

02 8066 0891

farinha@elevenwentworth.com

SIGNATURE

Signature of legal representative

A handwritten signature in black ink, appearing to be 'Julia W.', written over a horizontal line.

Capacity

Solicitor for Applicants

Date of signature

11 November 2025

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	2024/467526
Dates of hearing	28-29 May 2025
Material date	19 June 2025
Decision of	Justice Stevenson

FILING DETAILS

Filed for	Clough Projects Australia Pty Ltd, Salvatore Algeri and David Orr , applicants
Filed in relation to	Whole decision below
Legal representative	Justin Vaatstra, Arnold Bloch Leibler
Legal representative reference	011929377
Contact name and telephone	Justin Vaatstra, 61 3 9229 9961
Contact email	JVaatstra@abl.com.au

CERTIFICATION

I, Justin Vaatstra, solicitor for the Applicants, certify pursuant to paragraphs 27 and 28 of Practice Note SC CA 01 – Court of Appeal that the Applicants' Submissions filed 14 October 2025 are suitable for publication.